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## Targeting the Texas Citizen Participation Act: The 2019 Texas Legislature's Amendments to a Most Consequential Law

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## ARTICLE

# TARGETING THE TEXAS CITIZEN PARTICIPATION ACT: THE 2019 TEXAS LEGISLATURE'S AMENDMENTS TO A MOST CONSEQUENTIAL LAW

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STEVE BRESNEN<sup>\*\*\*</sup>

*No one else was in  
the room where it happened.  
No one really knows how the game is played,  
the art of the trade  
how the sausage gets made.*  
—Lin-Manuel Miranda, *Hamilton*, (2015)<sup>\*\*\*\*</sup>

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<sup>\*\*\*\*</sup> There was, in fact, a room where the negotiations happened, in the instance discussed. The authors of this Article worked with a variety of stakeholders and legislators to negotiate extensive changes to the Texas anti-SLAPP statute. Only a few clarifying amendments were made on the House

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floor. The negotiated bill passed into law based on the negotiations in that room without further changes.

## I. INTRODUCTION

Few laws enacted by the Texas Legislature in recent decades have had a greater impact on civil litigation than the Texas Citizen’s Participation Act (“TCPA”).<sup>1</sup> The original statute’s seemingly boundless application confounded judges obligated to apply the law as written.<sup>2</sup> Although the original TCPA legislation passed through the Legislature unanimously, after eight years in existence, the desire to narrow the statute’s scope united a wide array of legal, business, and even medical groups—including organizations frequently at odds with each other. During the Texas 86th Legislature Regular Session (2019), those groups put aside their traditional differences toward one goal: fixing the TCPA in order to save the statute from itself.<sup>3</sup> In response to widespread calls for change, the bill<sup>4</sup> passed with only one vote against it.<sup>5</sup> The new law became effective September 1, 2019 and now applies to actions filed on or after September 1, 2019.<sup>6</sup>

The 2019 revisions fell into four broad categories:

1. Narrowing key definitions, including, most importantly, the definition of “matter of public concern;”

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1. Act of June 17, 2011, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961 (amended 2019) (current version at TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011). See generally TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011 (codifying the TCPA).

2. See *Serafine v. Blunt*, 466 S.W.3d 352, 394–95 (Tex. App.—Austin 2015, no pet.) (Pemberton, J., concurring) (“The TCPA presents difficult issues of statutory construction that broadly impact not only the sound operation of our civil justice system, but the sometimes-competing rights of Texans that the statute was expressly intended to balance and reconcile.”); see also *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011) (“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.”).

3. See generally Sen. Comm. Rep., Bill Analysis, Tex. H.B. 2730, 86th Leg., R.S. (2019) (witness list) (providing the witness list for the 86th Legislature Regular Session); see also Testimony on Tex. H.B. 2730 Before the House Comm. on Judiciary and Civ. Juris., 86th Leg., R.S. (Apr. 1, 2019) (transcript available from Office of the House Committee Coordinator).

4. Act of June 1, 2019, 86th Leg., R.S., ch. 378, § 11, 2019 Tex. Sess. Law Serv. Ch. 378 (current version at CIV. PRAC. & REM. §§ 27.001–.011) (H.B. 2730, authored by the Rep. Jeff Leach, Chairman (R-Allen) and joint-authored by Reps. Four Price (R-Amarillo), Joe Moody (D-El Paso), Dustin Burrows (R-Lubbock) and Morgan Meyer (R-Dallas). Sponsored in the Senate by the Sen. Bryan Hughes (R-Mineola) and co-sponsored by Sen. Beverly Powell (D-Burleson)).

5. See *Roll Call: TX HB2730 | 2019–2020 | 86th Legislature*, LEGISCAN, <https://legiscan.com/TX/rollcall/HB2730/id/855089> [<https://perma.cc/CM82-ZF7K>] (charting votes for the bill).

6. Act of June 2, 2019, 86th Leg., R.S., ch. 378, §§ 1–12, 2019 Tex. Sess. Laws Ch. 378 (current version at TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011).

2. Increasing the number of exemptions;
3. Broadening protections for the media, consumer review platforms, domestic violence, and sexual assault survivors; and
4. Changing the procedures for resolving motions to dismiss.

Enacted in 2011, the TCPA is an “anti-SLAPP” statute—a species of law currently found in thirty-one states.<sup>7</sup> “SLAPP” stands for “strategic lawsuits against public participation.”<sup>8</sup> This Article provides a brief overview of the wide variety of state anti-SLAPP statutes and how they are typically intended to work.<sup>9</sup> The authors also discuss some concerns with the original TCPA by describing significant cases which led to the demand for legislation.

With respect to Texas’s 2019 changes, this Article will cover the statute’s legislative history, including how legislators and stakeholders contributed to those changes.

Two areas of change will receive substantial additional focus: (1) the narrowing effects of key definitions, especially the origin and meaning of “matter of public concern,” perhaps the most debated and controversial change;<sup>10</sup> and (2) broad protections for the media. We specifically focus on these two areas so lawyers will understand what informed the legislative

7. See Melissa Wasser, *Virginia Legislators Pass Bills Aimed at Dismissing Frivolous Lawsuits Restricting First Amendment Rights*, REPS. COMMITTEE FOR FREEDOM PRESS, (Feb. 20, 2020), <https://www.rcfp.org/virginia-anti-slapp-bills-analysis/> [<https://perma.cc/G44K-FAYR>] (“Thirty-one jurisdictions across the United States currently have some form of anti-SLAPP protections.”).

8. *Understanding Anti-SLAPP Laws*, REPS. COMMITTEE FOR FREEDOM PRESS, <https://www.rcfp.org/resources/anti-slapp-laws/> [<https://perma.cc/HY5Q-8YJS>].

9. There is no federal anti-SLAPP statute or rule, although bills have been filed in the United States Congress to implement one. See, e.g., H.R. 2304, 114th Cong. (1st Sess. 2015) (proposing the creation of a “special motion to dismiss” to counter SLAPP suits).

10. See Rick Blum, *New Legislation Would Imperil Texas Anti-SLAPP Law*, REPS. COMMITTEE FOR FREEDOM PRESS (Mar. 11, 2019), <https://www.rcfp.org/new-legislation-would-imperil-texas-anti-slapp-law/> [<https://perma.cc/C7Y7-P7VP>] (suggesting new anti-SLAPP amendments would remove the “clear protection[s]” provided by the TCPA). Justice Fields for the Austin Court of Appeals expanded further:

But the Legislature did not stop there—it further defined a ‘matter of public concern’ to include ‘economic’ or ‘community well-being’ or a ‘service in the marketplace.’ Such broad terms have forced courts, like the majority here, to conclude that disputes between an HOA and its property manager involve the right to free speech because it is relevant to ‘economic’ or ‘community well-being.’ It is difficult to reconcile such a conclusion with the stated purposes of the TCPA.

Neyland v. Thompson, No. 03-13-00643-CV, 2015 WL 1612155, at \*12 (Tex. App.—Austin Apr. 7, 2015, no pet.) (mem. op.) (Field, J., concurring).

changes to the “public concern” definition when litigating a TCPA motion and the reasons for expressly protecting the media—often the targets of SLAPP suits.

Finally, the Article will address new exemptions to the application of the TCPA, the operation of several “exceptions-to-exemptions,” and procedural changes which will affect how TCPA motions to dismiss are resolved.

## II. ANTI-SLAPP STATUTES AND HOW THEY TYPICALLY WORK

SLAPP lawsuits began receiving attention from legal scholars in the 1980s based on a study which determined SLAPP lawsuits were becoming more commonly used by large corporations and deep-pocketed plaintiffs to silence their critics.<sup>11</sup> The rise in SLAPP lawsuits likely stemmed from the significant increase in political activism in the 1960s and 1970s.<sup>12</sup> According to the study,<sup>13</sup> the solution to curbing these types of lawsuits was for a defendant—who was being sued for speaking out against the plaintiff—to invoke her First Amendment “[right] to petition”<sup>14</sup> in these types of cases.<sup>15</sup> This strategy allowed debates about issues of public concern to continue in the public realm rather than in a courtroom.<sup>16</sup> The concept gave birth to the first anti-SLAPP statute in 1989; many other states followed.<sup>17</sup>

A couple of examples may prove helpful to better understand the circumstances in which the use of an anti-SLAPP statute is appropriate.

11. See Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 LAW & SOC’Y REV. 385, 386 (1988) [hereinafter Canan & Pring, *Mixing Quantitative and Qualitative Approaches*] (finding SLAPP suits are a “political-legal phenomenon” deterring citizen participation).

12. See generally Landon A. Wade, Comment, *The Texas Citizen’s Participation Act: A Safe Haven for Media Defendants and Big Business, and a SLAPP in the Face for Plaintiffs with Legitimate Causes of Action*, 47 TEX. TECH L. REV. ONLINE EDITION 69, 73 (2014) (describing how SLAPP lawsuits were uncommon until political activism surged in popularity); Tom Wyrwich, Comment, *A Cure for a “Public Concern”?: Washington’s New Anti-SLAPP Law*, 86 WASH. L. REV. 663, 666 (2011).

13. See generally Canan & Pring, *Mixing Quantitative and Qualitative Approaches*, *supra* note 11; see also Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506 (1988) [hereinafter Canan & Pring, *Strategic Lawsuits*].

14. U.S. CONST. amend. I.

15. See generally Canan & Pring, *Mixing Quantitative and Qualitative Approaches*, *supra* note 11; Canan & Pring, *Strategic Lawsuits*, *supra* note 13.

16. Wade, *supra* note 12, at 72.

17. See generally *Anti-SLAPP Statutes and Commentary*, MEDIALAW, <https://www.medialaw.org/topics-page/anti-slapp?tmpl=component&print=1> [https://perma.cc/TD3J-DHUB] (offering commentary and history of SLAPPs in the United States).

Suppose a neighborhood association disagrees with a city over whether a gas station's design meets community building standards and files a routine appeal to stop the station's development. Enraged, the developer sues the neighborhood association and its members, individually, for defamation. The developer has the financial ability to sustain protracted litigation. Realizing this, the neighborhood association drops its appeal, unable to sustain emotional and financial costs associated with prolonged litigation, even if they would have ultimately prevailed in court.<sup>18</sup>

Another example involves a well-known comedian who criticized a privately-owned coal company and its owner after a mine collapsed, killing nine people. On the comedian's television show, he referred to a government report which concluded the collapse occurred because of unauthorized mining practices. He also noted the coal company's owner claimed an earthquake caused the accident.<sup>19</sup> In his caustic criticism, the comedian made derogatory remarks about the owner's physical appearance and age. Humiliated and angered by the comedian's remarks, the owner sued the comedian and the television network for defamation, false light, invasion of privacy, and intentional infliction of emotional distress, stating "[d]efendants childishly demeaned and disparaged [plaintiff] and his companies, made jokes about [plaintiff's] age, health, and appearance . . . all before a worldwide audience . . ."<sup>20</sup> Although the comedian and the network eventually prevailed in court, the lawsuit was filed in a state without an anti-SLAPP statute, which the judge noted with disappointment during the disposition of the case.<sup>21</sup>

"The goal of SLAPP [suit] filers," like the gas station developer and the coal company owner in our examples, is to silence the opposition by

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18. Michael Barajas, *Can Developers Sue You Because You Don't Like Their Development?* (July 26, 2016, 7:00 AM), <https://www.sacurrent.com/the-daily/archives/2016/07/26/can-developers-sue-you-because-you-dont-like-their-development> [<https://perma.cc/WBB2-Y9EY>].

19. Betsy Swan, *Republican Coal King Sues HBO Over John Oliver's Show*, DAILY BEAST, (July 22, 2017, 5:18 PM), <https://www.thedailybeast.com/coal-king-sues-hbo-over-john-olivers-show> [<https://perma.cc/7KZK-LTHR>].

20. Complaint at 2, Marshall Cty. Coal Co. v. John Oliver, No. 17-C-124, 2018 WL 1082525, at \*2 (W. Va. Cir. Ct. Feb. 22, 2018).

21. See Adrian Horton, *John Oliver Takes On Muzzling Lawsuits—and the Man Who Sued His Show*, GUARDIAN (Nov. 11, 2019, 12:08 PM), <https://www.theguardian.com/culture/2019/nov/11/john-oliver-last-week-tonight-lawsuits-murray-energy> [<https://perma.cc/58EW-65W7>] (describing details of a SLAPP suit involving John Oliver).

dragging defendants through expensive litigation until they surrender their right to comment on issues important to the public.<sup>22</sup>

Generally, anti-SLAPP laws provide the following: (1) a procedure for protection against lawsuits targeting someone who communicates about matters of public concern;<sup>23</sup> (2) rules to promptly (and hopefully, inexpensively) resolve such claims;<sup>24</sup> (3) a right of immediate appeal of a ruling on an anti-SLAPP motion;<sup>25</sup> and, (4) attorney's fees and other costs to be paid to a party who files the successful anti-SLAPP motion.<sup>26</sup> The heart of any effective anti-SLAPP statute is a provision authorizing a motion to dismiss early in a case, such as the clause present in the Texas law.<sup>27</sup> This method allows a defendant (the "movant" or party who filed the motion to dismiss) to force the hand of the plaintiff (or "nonmovant") early in a suit, staying all other action in the case until the motion is resolved. The underlying benefit is to reduce or avoid litigation costs if the motion prevails and the suit is dismissed.

State anti-SLAPP laws vary from being very broad to very narrow. For example, Delaware, Maryland, Maine, Nebraska, New York, and Utah are all recognized as having anti-SLAPP laws but do not *require* attorney's fees to be paid to a successful movant of a motion to dismiss.<sup>28</sup>

In thirteen states, the statutes protect only certain *types* of public concern.<sup>29</sup> Some states only allow a defendant who is "a public applicant or permittee" to bring an anti-SLAPP motion to dismiss.<sup>30</sup> Others have

22. Wade, *supra* note 12, at 71; Wyrwich, *supra* note 12, at 666.

23. Wetmore v. Bresnen, No. 03-18-00467-CV, 2019 WL 6885031, at \*3 (Tex. App.—Austin Dec. 18, 2019, no pet.) (mem. op.) ("The TCPA provides a procedure for expeditiously dismissing a nonmeritorious 'legal action' that is 'based on, relates to, or is in response' to the moving party's exercise of three statutorily defined rights: the right of association, the right of free speech, and the right to petition (the TCPA Rights)." (quoting Hersh v. Tatum, 526 S.W.3d 462, 463 (Tex. 2017))).

24. See *Anti-SLAPP Statutes and Commentary*, *supra* note 17 ("Anti-SLAPP statutes were proposed to provide a quick, effective and inexpensive mechanism to combat such suits.").

25. See *id.* (describing several state anti-SLAPP laws which provide for an immediate appeal).

26. See *generally id.* (discussing the model anti-SLAPP law's inclusion of attorney's fees and other costs).

27. See Wasser, *supra* note 7 (discussing Virginia's failure to include a clause providing for early motions to dismiss, which would have made the anti-SLAPP statute more effective); see also TEX. CIV. PRAC. & REM. CODE ANN. § 27.003 (describing procedures for filing a motion to dismiss in an anti-SLAPP suit).

28. *State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT: FIGHTING FOR FREE SPEECH, <https://anti-slapp.org/your-states-free-speech-protection#reference-chart> [<https://perma.cc/5L3X-DRGT>].

29. *Id.*

30. DEL. CODE ANN. tit. 10, § 8136 (2018).



narrowed the scope of anti-SLAPP motions to situations involving “permit[s], zoning change[s], leas[ing], [and] licens[ing].”<sup>31</sup> Pennsylvania limits its anti-SLAPP law to suits involving “enforcement of environmental law[s] and regulation.”<sup>32</sup> In Hawaii, protected activity is defined as “any oral or written testimony submitted or provided to a governmental body during the course of a governmental proceeding.”<sup>33</sup> Arizona’s law is also restricted to governmental proceedings but expands its applicability to include communication “[m]ade for the purpose of influencing a governmental action, decision or result.”<sup>34</sup>

On the other end of the spectrum, California’s anti-SLAPP statute is broad, as are both the original and revised Texas statutes; however, the new Texas law’s expressed protection for media defendants is broader than either California’s or the old Texas law.<sup>35</sup> Both states’ statutes apply to public and private communication for media and non-media defendants.<sup>36</sup> Kansas and Oklahoma arguably have the broadest statutes (Oklahoma<sup>37</sup> enacted the old Texas statute, in its entirety), especially pertaining to what constitutes a matter of public concern, which likely includes private matters.<sup>38</sup>

When the original proponents of the Texas anti-SLAPP law petitioned the Legislature in 2011 to enact the original TCPA, they noted the law “would allow frivolous lawsuits to be dismissed at the outset of the proceeding, promoting the *constitutional* rights of citizens and helping to

31. *Id.*; NEB. REV. STAT. § 25-21, 242 (2018).

32. 27 PA. STAT. & CONS. STAT. ANN. § 8301 (2018).

33. HAW. REV. STAT. ANN. § 634F-1 (2018).

34. ARIZ. REV. STAT. ANN. § 12-751 (2018).

35. *See generally* CAL. CIV. PROC. CODE § 425.16 (“To this end, this section shall be construed broadly.”); *cf.* Act of June 17, 2011, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961 (amended 2019).

36. *See* Tamkin v. CBS Broad., Inc., 122 Cal. Rptr. 3d 264, 273–74 (Cal. Ct. App. 2011) (concluding a script containing allegedly defamatory speech was not publicly disseminated); *see also* Lippincott v. Whisenhunt, 462 S.W.3d 507, 509 (Tex. 2015) (interpreting the Texas anti-SLAPP statute to both public and private communications).

37. *See generally* Aaron F. W. Meek & Noah E. W. Meek, *The Oklahoma Citizens Participation Act as a General Early Dismissal Procedure*, 90 OKLA. B.J. 32 (2019) (explaining the history and application of anti-SLAPP legislation in the State of Oklahoma).

38. *See* W. Gary Fowler, *A Slap at Employment Law? A Look at the Impact of Texas Citizens Participation Act in 2017*, JW|JACKSON WALKER (Dec. 17, 2017), <https://www.jw.com/news/a-slap-at-employment-law-a-look-at-the-impact-of-texas-citizens-participation-act-in-2017/> [<https://perma.cc/Z5V9-KT97>] (discussing a Texas case in which the court recognized the TCPA’s broader coverage over the matters of public concern).

alleviate some of the burden on the court system.”<sup>39</sup> Early dismissal was an especially noble goal considering the primary mechanism by which such lawsuits could be dismissed before the TCPA’s enactment was summary judgment. Often, summary judgment is obtained “only after a lengthy and costly discovery process.”<sup>40</sup> But in the eight years since enactment, the TCPA revealed one unintended consequence of its broad language was to essentially close the courthouse doors to Texas litigants with righteous claims.<sup>41</sup>

### III. HOW THE TCPA WENT WRONG AND WHY REFORM WAS NEEDED

While the TCPA states its purpose is to “encourage and safeguard . . . constitutional rights,”<sup>42</sup> the Texas Supreme Court and various Courts of Appeals held the old TCPA was considerably broader than the protection of constitutional rights.<sup>43</sup> The old TCPA’s broad definitions of the “rights of free speech and association” and “legal action” led to its application in unanticipated cases, including family law,<sup>44</sup> probate,<sup>45</sup> trade secret protection,<sup>46</sup> and State Bar of Texas enforcement actions.<sup>47</sup> Even more

39. House Research Org., Bill Analysis, Tex. H.B. 2973, 82d Leg., R.S. (2011) (emphasis added).

40. *The Texas Anti-SLAPP Statute: An Effective Statute, but Is It Too Broad?*, TEXANS FOR LAWSUIT REFORM FOUND. 1 (Dec. 2018), [http://www.tlrfoundation.com/wp-content/uploads/2019/02/TLR\\_SLAPP\\_Foundation\\_Paper\\_12.2018\\_V01.pdf](http://www.tlrfoundation.com/wp-content/uploads/2019/02/TLR_SLAPP_Foundation_Paper_12.2018_V01.pdf) [<https://perma.cc/U7JD-NZM5>] [hereinafter *The Texas Anti-SLAPP Statute*].

41. Amanda G. Taylor, *2018 Anti-SLAPP Update*, in STATE BAR OF TEXAS, 35TH ANNUAL LITIGATION UPDATE INSTITUTE 2 (2019) (“Without question, the TCPA continues to favor movants. Approximately 61% of the cases were decided in favor of movants in 2018.”).

42. TEX. CIV. PRAC. & REM. CODE ANN. § 27.002.

43. *Youngkin v. Hines*, 546 S.W.3d 675, 680 (Tex. 2018); *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 894 (Tex. 2018); *Abatecola v. 2 Savages Concrete Pumping, LLC*, No. 14-17-00678-CV, 2018 WL 3118601, at \*4 (Tex. App.—Houston [14th Dist.] June 26, 2018, pet. denied) (mem. op.); *Price v. Buschemeyer*, No. 12-17-00180-CV, 2018 WL 1569856, at \*2 (Tex. App.—Tyler Mar. 29, 2018, pet. denied) (mem. op.); *Collins v. Collins*, No. 01-17-00817-CV, 2018 WL 1320841, at \*4 (Tex. App.—Houston [1st Dist.] Mar. 15, 2018, pet. denied) (mem. op.).

44. *See, e.g., Smith v. Malone*, No. 05-18-00216-CV, 2018 WL 6187639, at \*1 (Tex. App.—Dallas Nov. 27, 2018, pet. denied) (mem. op.) (applying the TCPA where the plaintiff claimed the defendant sued her in retaliation to her seeking child support).

45. *See, e.g., Collins*, 2018 WL 1320841, at \*2 (applying the TCPA in a probate dispute even where a divorce dispute involved a private matter).

46. *See, e.g., Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 193 (Tex. App.—Austin 2017, pet. dismissed) (employing the TCPA to “defend against claims seeking to remedy alleged misappropriation or misuse of a business’ trade secrets or confidential information”).

47. *See, e.g., Comm’n for Lawyer Discipline v. Rosales*, 577 S.W.3d 305, 311 (Tex. App.—Austin 2019, pet. denied) (concluding the Commission on Lawyer Discipline “is not exempt from the TCPA under the plain language of subsection 27.010(a)”).

consequential—these definitions, coupled with the statute's previous definition of “public concern,” made the statute one of the most litigated in recent Texas history.<sup>48</sup>

From April 2018 until April 2019, the Office of Court Administration reported 99,300 filed documents referenced the TCPA.<sup>49</sup> For comparison, there were only about 305,400 documents filed referencing summary judgment during the same one year period.<sup>50</sup> From 2011 through 2019, there were 407 appellate court opinions interpreting the TCPA.<sup>51</sup> Moreover, the number of appellate opinions dramatically escalated with each passing year after the TCPA's inception—with only 4 opinions in 2012, 21 opinions in 2013, 25 opinions in 2014, 40 opinions in 2015, 55 opinions in 2016, 47 opinions in 2017, 94 opinions in 2018, and 121 opinions in 2019.<sup>52</sup> The Texas Supreme Court issued eight opinions in the first six months of 2018 alone.<sup>53</sup> According to a staff attorney at the Fifth Court of Appeals in Dallas, over 40% of cases on the court's docket were TCPA cases.<sup>54</sup>

Judges at all levels throughout the state expressed discontent with the breadth of the TCPA.<sup>55</sup> Very pointed pleas were made to the Legislature

48. See *Cavin v. Abbott*, 545 S.W.3d 47, 49 (Tex. App.—Austin 2017, no pet.) (“This case illustrates that the [TCPA] as written—and, therefore, as the Texas Judiciary must apply it—can be invoked successfully in the context of litigation arising from family tumult over an adult daughter's choice of a husband.”); see also *Neyland v. Thompson*, No. 03-13-00643-CV, 2015 WL 1612155, at \*12 (Tex. App.—Austin Apr. 7, 2015, no pet.) (Field, J., concurring) (mem. op.) (“It seems that any skilled litigator could figure out a way to file a motion to dismiss under the TCPA in nearly every case, in the hope that the case will not only be dismissed, but that the movant will also be awarded attorneys' fees.”); *The Texas Anti-SLAPP Statute*, *supra* note 40, at 18. (“Because courts have interpreted the TCPA so broadly, it is being used in litigation of all varieties. The numerous appeals in TCPA cases demonstrate that Texas's appellate courts are expending significant time reviewing and ruling on issues raised by the TCPA.”).

49. Briefing Document: H.B. 2730 (Engrossed), Tex. H.B. 2730, 86th Leg., R.S. (2019) (on file with authors) [hereinafter H.B. 2730 Briefing Doc.].

50. Email from Megan LaVoie, Dir. of Public Affairs & Special Counsel, Office of Court Administration, to Steve Bresnen (Apr. 9, 2019, 3:31:43 PM) (on file with authors).

51. Mark C. Walker, *The Essential Guide to the Texas Anti-SLAPP Law, The Texas Defamation Mitigation Act, and Rule 91a*, in STATE BAR OF TEXAS, 36TH ANNUAL LITIGATION INSTITUTE 1 (2020).

52. *Id.*

53. *Id.*

54. H.B. 2730 Briefing Doc., *supra* note 49.

55. See *In re SSCP Mgmt., Inc.*, 573 S.W.3d 464, 466 (Tex. App.—Fort Worth 2019, no pet.) (“‘It's *déjà vu* all over again’ as this court journeys on its latest foray through the ever evolving battlefields of the [TCPA].” (quoting YOGI BERRA, THE YOGI BOOK: I REALLY DIDN'T SAY EVERYTHING I SAID! (1999))).

to reign in the statute.<sup>56</sup> The Texas Supreme Court was repeatedly invited to narrow its interpretation of the law, resulting in some very interesting opinions.<sup>57</sup> Judges, lawyers, and litigants all yearned for change.

Although the purpose of the TCPA was to protect a *movant's* constitutional rights, as originally drafted, it could be unusually draconian to a *nonmovant*.<sup>58</sup> When a movant filed the motion to dismiss, discovery in the case was suspended until the trial court ruled on the motion, unless “the court . . . allow[ed] specified and limited discovery relevant to the motion.”<sup>59</sup> Also, the nonmovant’s case could be tied up for years because the movant is authorized to file interlocutory appeals of a denial of a motion to dismiss.<sup>60</sup>

Under the old law,<sup>61</sup> the statute required a three-step decisional process in an abbreviated timeframe. As a result:

1. The first step in resolving the motion under the prior statute required the trial court to dismiss an action “if the moving party shows by a

56. See *Serafine v. Blunt*, 466 S.W.3d 352, 394–95 (Tex. App.—Austin 2015, no pet.) (“Even better, I would hope that the Texas Legislature might be listening, because it could provide, by amending the TCPA, the clearest and most direct expression of any legislative intent that has been eluding the Judicial Branch.”); see also *Universal Plant Servs., Inc. v. Dresser-Rand Grp., Inc.*, 571 S.W.3d 346, 365 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (Keyes, J., concurring to her own majority opinion) (expressing concern with how expansively the statute has been interpreted, urging it “be brought back into compliance with the rules of statutory construction”); *Gaskamp v. WSP USA, Inc.*, No. 01-18-00079-CV, 2018 WL 6695810, at \*13–16 (Tex. App.—Houston [1st Dist.] Dec. 20, 2018) *withdrawn and superseded on reconsideration en banc*, 596 S.W.3d 457 (Tex. App.—Houston [1st Dist.] 2020, pet. filed) (Jennings, J., concurring and dissenting) (contending the Supreme Court has gone too far in its broad interpretation of the TCPA, and urging the legislature to repeal or amend it).

57. See, e.g., *Universal Plant Servs., Inc.*, 571 S.W.3d at 371 (Keyes, J., concurring to her own majority opinion) (requesting “the Texas Supreme Court make it clear” when a TCPA motion may be denied).

58. *Kawcak v. Antero Res. Corp.*, 582 S.W.3d 566, 569 (Tex. App.—Fort Worth 2019, pet. denied) (“No one can doubt the power of the TCPA to rock a claimant back on its heels. Once in the grip of the TCPA, a party may stairstep down increasingly dire consequences that most litigants do not have to face: [1] All discovery is suspended until the trial court rules[,] . . . [2] in an abbreviated time frame, the party bringing the claim must establish a prima facie case for each of its essential elements with clear and specific evidence . . . [3] the parties may file an interlocutory appeal . . . [4] a final result that may be an order of the trial or appellate court that dismisses the action, bringing the consequences of not only paying the party’s fees . . . but also . . . court costs, reasonable attorney’s fees, and expenses incurred by the party’s opponent and an award of sanctions.”).

59. TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(b).

60. *Id.* § 27.008(b); see also *Kawcak*, 582 S.W.3d at 569 (stating the ability to file interlocutory appeals is an “increasingly dire consequence[]” unique to TCPA cases).

61. Much of this process was not affected by the 2019 amendments. See *infra* Part VII for changes.

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 [or] the right to petition."<sup>62</sup> (The same procedure applies in cases in which the right of association is at issue.)

2. Under the second step, the court may not dismiss the action if the non-moving party "establishe[d] by clear and specific evidence a prima facie case for each essential element of the claim in question."<sup>63</sup>
3. Third, the movant could *still* prevail if she established "by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim."<sup>64</sup>

The parties could appeal if not satisfied with the trial court's ruling. A movant's interlocutory appeal of a denial extended the time during which discovery was suspended.<sup>65</sup> A final decision dismissing the claimant or nonmovant's action resulted in the nonmovant paying her own expenses and the movant's attorney's fees and sanctions, both of which were

62. *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 132 (Tex. 2019); Act of June 17, 2011, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961 (amended 2019).

63. CIV. PRAC. & REM. § 27.005(c); *Creative Oil & Gas, LLC*, 591 S.W.3d at 132; see *Baumgart v. Archer*, 581 S.W.3d 819, 831 (Tex. App.—Houston [1st Dist.] 2019, pet. denied) (holding nonmovant failed to meet his burden to establish clear and specific evidence of a prima facie case for each essential element of his claim); *Mazaheri v. Tola*, No. 05-18-01367-CV, 2019 WL 3451188, at \*2 (Tex. App.—Dallas July 31, 2019, pet. denied) (mem. op.) ("The TCPA does not define the phrase 'clear and specific evidence,' but the supreme court has held the standard requires more than mere notice pleadings and a plaintiff 'must provide enough detail to show the factual basis for its claim.'" (quoting *In re Lipsky*, 460 S.W.3d 579, 591 (Tex. 2015))); *In re Lipsky*, 460 S.W.3d at 590 ("[A prima facie case] refers to evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted. It is the 'minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true.'" (quoting *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004))); see also *In re Lipsky*, 460 S.W.3d at 590 ("The TCPA's direction that a claim should not be dismissed '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' thus describes the clarity and detail required to avoid dismissal." (quoting CIV. PRAC. & REM. § 27.005(c))); *Bass v. United Dev. Funding, L.P.*, No. 05-18-00752-CV, 2019 WL 3940976, at \*16 (Ct. App.—Dallas Aug. 21, 2019, pet. denied) (mem. op.) (stating the burden of proof for a prima facie TCPA case); cf. *Neurodiagnostic Consultants, LLC v. Nallia*, No. 03-18-00609-CV, 2019 WL 4231232, at \*12 (Tex. App.—Austin Sept. 6, 2019, no pet.) (mem. op.) (holding the plaintiff met its burden to establish by clear and specific evidence its claims for civil conspiracy, breach of fiduciary duty, and misappropriation of trade secrets).

64. *Creative Oil & Gas*, 591 S.W.3d at 132; Act of June 14, 2013, 83d Leg., R.S., ch. 1042, § 2, 2013 Tex. Gen. Laws 2499 (amended 2019) (current version at CIV. PRAC. & REM. § 27.005).

65. CIV. PRAC. & REM. § 51.014(a)(12).

mandatory.<sup>66</sup> However, if the nonmovant prevailed against a motion to dismiss, she could only be awarded attorney's fees if the movant's motion to dismiss was found to be frivolous or solely intended to delay.<sup>67</sup>

Although Texas litigants should be able to pursue valid claims in court, this right should not interfere with constitutional rights under the First Amendment. There are few things more sacred to Americans than preserving the right to engage in discourse on matters of public concern. But, the lop-sided risks—coupled with the statute's potential to endlessly prolong suits—made it imperative for the Legislature, given the underlying purpose of the statute, to narrow the statute's applicability thoughtfully and carefully.

Much of the statute's extraordinary reach resulted from the disconnect between the TCPA's stated purpose of protecting constitutional rights and the actual wording of the old TCPA's definitions. The broad definitions led the courts to apply it more broadly than traditional First Amendment protections.<sup>68</sup> Under the old motion to dismiss provision, the statute read: "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."<sup>69</sup> Arguably, the "rights" referred to were intended to mean the *constitutional rights* addressed by the chapter's purpose provision.<sup>70</sup> But the statute went further in its definitions, extending the reach of the TCPA well beyond First Amendment jurisprudence.<sup>71</sup>

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66. See *Sullivan v. Abraham*, 472 S.W.3d 677, 681–82 (Tex. App.—Amarillo 2014), *rev'd on other grounds*, 488 S.W.3d 294 (Tex. 2016) (emphasizing "fees and expenses must be awarded").

67. CIV. PRAC. & REM. § 27.009(b); see *Taylor*, *supra* note 41, at 21 ("Aside from one opinion affirming such an award based on waiver, the author is not aware of any opinion affirming an award under section 27.009(b) on its merits.").

68. See *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 892 (Tex. 2018) ("The TCPA provides its own definition of 'exercise of the right of free speech.' The statutory definition is not fully coextensive with the constitutional free-speech right protected by the First Amendment to the U.S. Constitution and article I, section 8 of the Texas Constitution." (quoting CIV. PRAC. & REM. § 27.003(a))).

69. Act of June 17, 2011, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961 (amended 2019).

70. See CIV. PRAC. & REM. § 27.002 (referring to constitutional rights).

71. Zach Wolfe, *A SLAPP in the Face to Texas Trade Secrets Lawsuits—Part 2*, FIVE MINUTE L. (June 12, 2017), <https://fiveminutelaw.com/2017/06/12/slapp-in-the-face-to-texas-trade-secrets-lawsuits-part-2/> [https://perma.cc/KL9V-8U5R].

Three specific definitions in the prior statute—and a general provision directing courts to construe the chapter liberally<sup>72</sup>—led courts to extend the statute's application beyond its purpose provision: (1) the right of association; (2) legal action; and (3) matter of public concern. With the confluence of these four provisions of the old law, a Texas-sized litigation epidemic was born.

The next part of this Article addresses each of these prior definitions, juxtaposed with the new definitions, to show how the Legislature targeted each of them to better serve the TCPA's original purposes.

#### IV. NARROWING KEY DEFINITIONS

##### A. *Reducing the Sweep of "Right of Association"*

###### **The old law:**

"Exercise of the right of association' means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests."<sup>73</sup>

###### **The new law:**

"Exercise of the right of association" means to join together to collectively express, promote, pursue, or defend common interests *relating to a governmental proceeding or a matter of public concern*.<sup>74</sup>

The old definition did not require the exercise of association rights involve a governmental proceeding or a matter of public concern, the absence of which had the effect of extending its reach well beyond First Amendment constitutional rights.<sup>75</sup> By adding the language requiring one of two additional elements—using the disjunctive "or"—the Legislature

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72. CIV. PRAC. & REM. § 27.011(b); *see also* *Kawcak v. Antero Res. Corp.*, 582 S.W.3d 566, 575 (Tex. App.—Fort Worth 2019, pet. denied) ("Exacerbating our challenge is the TCPA's directive that it 'shall be construed liberally to effectuate its purpose and intent fully.'" (quoting CIV. PRAC. & REM. § 27.011(b))).

73. Act of June 17, 2011, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961 (amended 2019).

74. CIV. PRAC. & REM. § 27.001(2) (emphasis added).

75. *Compare* Act of June 17, 2011, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961 (amended 2019) (referring to "common interests," but not public concern), *with* CIV. PRAC. & REM. § 27.001(2) (containing new language "relating to a governmental proceeding or a matter of public concern").

limited the definition's reach to more traditional anti-SLAPP functions: the former protecting public participation in governmental processes, and the latter protecting the free speech concerns addressed under the new definition of a matter of public concern.<sup>76</sup> The new definition of public concern is addressed in Part IV-C of this Article.

The term “common interests” was undefined under the old law and effectively unlimited. This led some courts to hold disputes alleging misappropriation of trade secrets and violations of employment-related agreements—such as enforcement of covenants not to compete—constituted “pursuing common interests,”<sup>77</sup> because those cases inevitably involved people alleged to be engaging in such conduct at the expense of someone else.

In *Elite Autobody LLC v. Autocraft Bodywerks, Inc.*,<sup>78</sup> a trade secrets dispute between two auto repair businesses, the Third Court of Appeals in Austin rejected the argument the TCPA did not apply between two alleged tortfeasors in violation of the Texas Uniform Trade Secrets Act.<sup>79</sup> In doing so, the court asserted the “communications” at the heart of the issue fell within the definition of “communications” in the TCPA and the communications were “between individuals who join together to collectively . . . promote, pursue, or defend common interests.”<sup>80</sup> Similarly, in *Craig v. Tejas Promotions, LLC*,<sup>81</sup> the plaintiff (Tejas) sued the defendant (Craig)—a would-be customer—for alleged trade secret violations. Craig was able to persuade the court the TCPA applied because the customers

76. See *infra* Part IV-C.

77. See *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191, 204 (Tex. App.—Austin 2017, pet. dismissed) (“And in *Coleman’s* wake, we must reject [the nonmovant’s] attempts to limit TCPA ‘communications’ solely to those the First Amendment protects.”); see also *Schlumberger Ltd. v. Rutherford*, 472 S.W.3d 881, 895 (Tex. App.—Houston [1st Dist.] 2015) (holding the breach-of-contract claim was subject to dismissal under the TCPA, but nonmovant had met its burden under the Act’s burden shifting provisions for the subject claim); *Morgan v. Clements Fluids S. Tex., Ltd.*, 589 S.W.3d 177, 185 (Tex. App.—Tyler 2018, no pet.) (deciding an employer’s action against three former employees for misappropriation of trade secrets was based on the employees’ communications amongst themselves and others within the employer’s competitors; therefore, the action responded to their exercise of a right under the TCPA).

78. *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, 520 S.W.3d 191 (Tex. App.—Austin 2017, pet. dismissed).

79. See *generally id.* (stating the Texas Citizens Participation Act (TCPA) “can potentially be invoked successfully to defend against claims seeking to remedy alleged misappropriation or misuse of a business’s trade secrets or confidential information.”) (footnote omitted).

80. *Id.*

81. *Craig v. Tejas Promotions, LLC*, 550 S.W.3d 287 (Tex. App.—Austin 2018, pet. denied).



were exercising their right of association—even if this association involved misappropriating the company's trade secrets.<sup>82</sup> The Fourteenth Court of Appeals in Houston also interpreted the definition broadly in holding the TCPA's "right of association" applied to certain tortious interference claims involving a covenant not to compete.<sup>83</sup>

But, in early 2019, just as the Legislature prepared to consider amendments to the old definition, the winds began to change in the North Texas courts. Both the Fifth Court of Appeals in Dallas and the Second Court of Appeals in Fort Worth separately refused to follow *Elite AutoBody* and its progeny by holding the plain language of the old definition of "right of association" did in fact require some kind of public participation and not just a mere agreement between two parties who claim to be "associated."<sup>84</sup> Interestingly, one of these opinions was issued on the legislative bill filing deadline day, and all five filed bills proposing to amend the TCPA amended the definition of "right of association."<sup>85</sup> Whether the courts were paying attention to the TCPA legislative bill filings—or whether this was merely a coincidence—is unknown.

In *Kawcak v. Antero Resources Corp.*,<sup>86</sup> the Second Court of Appeals in Fort Worth refused to apply the TCPA motion to dismiss in a suit involving a "kickback scheme" allegedly costing the plaintiff company hundreds of millions of dollars.<sup>87</sup> In a matter of first impression, the court interpreted the word "common" in the old definition of the "right of association" under its plain meaning, asserting the term required more than two tortfeasors conspiring to act tortiously for their own selfish benefit. "Because Kawcak acknowledge[d] that his invocation of the TCPA assumes a definition of

82. *Id.*; *The Texas Anti-SLAPP Statute*, *supra* note 40.

83. *See generally* *Abatecola v. 2 Savages Concrete Pumping, LLC*, No. 14-17-00678-CV, 2018 WL 3118601, at \*9 (Tex. App.—Houston [14th Dist.] June 26, 2018, pet. denied) (mem. op.) (concluding the commercial speech exemption in the TCPA did apply to tortious interference claims based on contact with customers but did not apply to tortious interference claims based on allegedly inducing violations of a restrictive covenant).

84. *See Kawcak v. Antero Res. Corp.*, 582 S.W.3d 566, 579 (Tex. App.—Fort Worth 2019, pet. denied) ("To give the word 'common' a definition that embraces the actions of only two tortfeasors would make the right of association an outlier in this TCPA scheme."); *Dyer v. Medoc Health Servs., LLC*, 573 S.W.3d 418, 427 (Tex. App.—Dallas 2019, pet. denied).

85. *See* Tex. H.B. 2730, 86th Leg., R.S. (2019); Tex. H.B. 3547, 86th Leg., R.S. (2019); Tex. H.B. 4575, 86th Leg., R.S. (2019); Tex. S.B. 2162, 86th Leg., R.S. (2019).

86. *Kawcak v. Antero Res. Corp.*, 582 S.W.3d 566 (Tex. App.—Fort Worth 2019, pet. denied).

87. *Id.* at 569–70.

‘common’ at odds with our holding,” the court concluded the TCPA did not apply to this lawsuit.<sup>88</sup> Analyzing the definition, the court reasoned:

[I]t establishes a point where two roads of TCPA interpretation diverge. One road assigns meaning to the word ‘common’ that embraces a set of only two people and triggers the TCPA in almost any case of conspiracy. The other road reads ‘common’ to embrace a larger set defined by the public or at least a group. In our view, a plain-meaning interpretation of the TCPA supports the second definition.<sup>89</sup>

The court explained in great detail why its construction of the word “common” was not in conflict with the plain meaning of the word or with the intended use under the definition of “right of association.”<sup>90</sup>

In *Dyer v. Medoc Health Services, LLC*,<sup>91</sup> the Fifth Court of Appeals concluded a conspiracy between tortfeasors—who claimed they had a right to associate with each other to pursue a “common interest” by allegedly misappropriating the plaintiff’s proprietary software and confidential business information—did not fall under the statute’s old definition and affirmed the trial court’s denial of the motion to dismiss. In doing so, the court asserted that to allow such an interpretation would be an absurd result and “would not further the purpose of . . . curb[ing] strategic lawsuits against public participation. . . .”<sup>92</sup> At least systematically, this court followed its precedent of narrowing the definition of “right of association” to include either public or citizen participation.<sup>93</sup>

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88. *Id.* at 588.

89. *Id.* at 573.

90. *Id.*

91. *Dyer v. Medoc Health Servs., LLC*, 573 S.W.3d 418 (Tex. App.—Dallas 2019, pet. denied).

92. *Id.*

93. *See* *Perlman v. EKLS Firestopping & Constr., LLC*, No. 05-18-00971-CV, 2019 WL 2710752, at \*4 (Tex. App.—Dallas June 28, 2019, no pet.) (mem. op.) (holding a breach of contract claim did not relate to the exercise of free speech, the exercise of right of association, or involved public or citizen participation); *see also* *Reed v. Centurion Terminals, LLC*, No. 05-18-01171-CV, 2019 WL 2865281, at \*5 (Tex. App.—Dallas July 3, 2019, pet. denied) (mem. op.) (“This court has already held that the TCPA’s definition of the right of association does not apply to private communications that did not involve any public or citizen’s participation.”); *Noble Anesthesia Partners, PLLC v. U.S. Anesthesia Partners, Inc.*, No. 05-18-00768-CV, 2019 WL 3212137, at \*3 (Tex. App.—Dallas July 9, 2019, pet. denied) (mem. op.) (concluding the surgeon’s group made “no showing that [the employees] were individuals who ‘joined together to collectively express, promote, pursue, or defend common interests.’” (quoting TEX. CIV. PRAC. & REM. CODE ANN § 27.001(2))); *Damonte v. Hallmark Fin. Servs. Inc.*, No. 05-18-00874-CV, 2019 WL 3059884, at \*5 (Tex. App.—Dallas July 12, 2019, no pet.) (mem. op.) (deciding the claims based on communications among alleged tortfeasors to misappropriate

The Fourteenth Court of Appeals in Houston also began to narrow the definition of “right of association” by concluding the TCPA did not cover a conspiracy to commit theft or conversion.<sup>94</sup> In contrast, the Third Court of Appeals in Austin and the Ninth Court of Appeals in Beaumont applied the old definition of “right of association” to misappropriation of trade secret claims, but determined the commercial speech exemption<sup>95</sup> also applied to the claims and so affirmed the lower courts’ denial of the TCPA motion.<sup>96</sup>

The conflict between the state appellate courts highlighted the need to give thoughtful consideration to the “right of association” definition. After much negotiation amongst the stakeholders, the new definition expressly requires the communication at issue relate to a governmental proceeding or a matter of public concern. Notably, neither the new nor prior definition restricts the communication to being spoken or written. The absence of such limiting language allows the definition to be applied to expressive *conduct*—an observation buttressed by the actual verbiage authorizing the motion to dismiss—only requiring the movant to have “exercised” the right of association for the statute to apply.<sup>97</sup> Notably, there may be significant overlap between the definition of the right to petition, which is closely tied

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confidential and proprietary information were not communications protected by the right of association under the TCPA); *Shields v. Shields*, No. 05-18-01539-CV, 2019 WL 4071997, at \*7 (Tex. App.—Dallas Aug. 29, 2019, pet. denied) (mem. op.) (“[W]e have repeatedly held that a movant must demonstrate that the communication involved public or citizen’s participation.”); *Rouzier v. BioTE Med., LLC*, No. 05-19-00277-CV, 2019 WL 6242305, at \*3 (Tex. App.—Dallas Nov. 22, 2019, no pet.) (mem. op.) (explaining “[d]iscussions among alleged tortfeasors to misappropriate confidential and proprietary information are not communications” protected under the statute’s definition of right of association); *Goldberg v. EMR (USA Holdings) Inc.*, 594 S.W.3d 818, 833 (Tex. App.—Dallas 2020, pet. denied) (stating defendants “failed to prove by a preponderance of the evidence that Plaintiffs’ claims [were] based on, relate[d] to, or [were] in response to Defendants’ exercise of the right of association or free speech” in a breach of contract and various commercial tort actions).

94. *Bandin v. Free & Sovereign State of Veracruz de Ignacio de la Llave*, 590 S.W.3d 647, 652 (Tex. App.—Houston [14th Dist.] 2019, pet. filed) (“Our court has not addressed whether the TCPA covers a conspiracy to commit theft or conversion; neither has the Supreme Court of Texas. We conclude that the TCPA does not extend so far.”).

95. Act of June 17, 2011, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961 (amended 2019).

96. See *Rose v. Sci. Mach. & Welding, Inc.*, No. 03-18-00721-CV, 2019 WL 2588512, at \*5 (Tex. App.—Austin June 25, 2019, no pet.) (mem. op.) (finding the commercial-speech exemption where “a high-level executive of a company . . . primarily design[ed] and [sold] manufactured items to customers . . . .”); *TransDesign Int’l, LLC v. SAE Towers, Ltd.*, No. 09-18-00080-CV, No. 09-18-00081-CV, 2019 WL 2647659, at \*8–9 (Tex. App.—Beaumont June 22, 2018, pet. denied) (mem. op.).

97. See TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a) (“If a legal action is based on or is in response to a party’s *exercise* of the right of free speech, right to petition, or right of association . . . .”) (emphasis added).

to public participation in government, and the exercise of the right of association, which is partially tied to expressions regarding matters “relating to a governmental proceeding.”<sup>98</sup>

Collectively, by including the elements of public participation in government and expression regarding matters of public concern, the amendments to the definition of the right of association moved the focus of the TCPA much closer to its stated purpose: the protection of *constitutional* rights.

#### B. *Narrowing the Definition of “Legal Action”*

##### **The old law:**

“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.<sup>99</sup>

##### **The new law:**

“Legal action” means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal, *declaratory*, or equitable relief. *The term does not include:*

(A) *a procedural action taken or motion made in an action that does not amend or add a claim for legal, equitable, or declaratory relief;*

(B) *alternative dispute resolution proceedings; or*

(C) *post-judgment enforcement actions.*<sup>100</sup>

Under the old TCPA, courts struggled with the definition of “legal action” because it allowed creative attorneys to plead their cases into the TCPA’s coverage in seemingly unfathomable ways.<sup>101</sup> As one jurist stated,

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98. Compare *id.* § 27.001(2) (defining the right of association as involving public concern), with *id.* § 27.001(4)(a)(ix) (discussing the role of public concern under the definition of the right to petition).

99. Act of June 17, 2011, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961 (amended 2019).

100. CIV. PRAC. & REM. § 27.001(6)(A)–(C) (emphasis added).

101. Act of June 17, 2011, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961 (amended 2019) (“‘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.”).

the definition of “legal action” in the TCPA appears to encompass any “procedural vehicle for the vindication of a legal claim.”<sup>102</sup>

Motions were filed in opposition to third party subpoenas,<sup>103</sup> motions for sanctions,<sup>104</sup> and post-judgment enforcement actions.<sup>105</sup> Lawyers even filed TCPA motions to dismiss in response to TCPA motions to dismiss.<sup>106</sup>

In *Sullivan v. Texas Ethics Commission*,<sup>107</sup> a state agency fined an individual for failing to register as a lobbyist and the individual filed a de novo appeal

102. *Paulsen v. Yarrell*, 537 S.W.3d 224, 233 (Tex. App.—Houston [1st Dist.] 2017, pet. denied); *see In re Elliott*, 504 S.W.3d 455, 465 (Tex. App.—Austin 2016, orig. proceeding) (holding the TCPA’s “broad definition” encompasses a petition under the Texas Rule of Civil Procedure 202); *see Better Bus. Bureau of Metro. Dall., Inc. v. Ward*, 401 S.W.3d 440, 443 (Tex. App.—Dallas 2013, pet. denied) (stating the definition is “broad and evidences a legislative intent to treat any claim by any party on an individual and separate basis”). *But see Paulsen*, 537 S.W.3d at 233 (noting, however, a TCPA dismissal motion is not itself a TCPA “legal action”).

103. *See, e.g., Wetmore v. Bresnen*, No. 03-18-00467-CV, 2019 WL 6885031, at \*4 (Tex. App.—Austin Dec. 18, 2019, no pet.) (mem. op.) (holding “a subpoena in this context does not meet the definition of ‘legal action’”); *see also* TEX. R. CIV. P. 176.1 (outlining requirements for issuing a subpoena); CIV. P. 176.4 (providing who may issue a subpoena); *Dow Jones & Co., Inc. v. Highland Capital Mgmt., L.P.*, 564 S.W.3d 852, 856 (Tex. App.—Dallas 2018, pet. denied) (citation omitted) (concluding subpoena is not a “legal action” because “a subpoena is not a ‘filing[.]’ [i]t is an issuance . . . .”); *Greiner v. Womack*, No. 04-19-00525-CV, 2019 WL 5405904, at \*1 (Tex. App.—San Antonio Oct. 23, 2019, no pet.) (mem. op.) (holding a “subpoena is not a legal action” under the TCPA). *See generally* CIV. P. 176.1–6.8 (promulgating the rules for issuing a subpoena).

104. *See, e.g., Hawxhurst v. Austin’s Boat Tours*, 550 S.W.3d 220, 226 (Tex. App.—Austin 2018, no pet.) (reasoning a counterclaim or motion for sanctions is a “legal action” under the TCPA); *see also Misko v. Johns*, 575 S.W.3d 872, 877–78 (Tex. App.—Dallas 2019, pet. denied) (concluding the definition of “legal action” in the TCPA does not encompass a motion for sanctions alleging discovery abuse by a party filed after commencement of litigation).

105. *See* TEX. CONST. art. V, § 1 (“The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law.”); *see also* TEX. GOV’T CODE ANN. § 21.001 (“A court has all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including authority to issue the writs and orders necessary or proper in aid of its jurisdiction.”); *Wetmore*, 2019 WL 6885031, at \*6 (concluding plaintiff failed to demonstrate a motion to compel and for sanctions was related to his exercise of his TCPA rights); *Sullivan v. Tex. Ethics Comm’n*, 551 S.W.3d 848, 858 (Tex. App.—Austin 2018, pet. denied).

106. *See, e.g., Paulsen*, 537 S.W.3d at 233 (dismissing motions to dismiss as legal actions per the TCPA); *see also Roach v. Ingram*, 557 S.W.3d 203, 219 (Tex. App.—Houston [14th Dist.] 2018, pet. denied) (holding the counter-TCPA motion to dismiss must establish the lawsuit concerned the right of free speech in connection with a matter of public concern); *Deepwell Energy Servs., LLC v. Aveda Transp. & Energy Servs.*, 574 S.W.3d 925, 927–28 (Tex. App.—Eastland 2019, pet. denied) (construing the “catch-all” phrase of the TCPA and determining a TCPA motion to dismiss was not included as a “legal action” under the phrase “or any other judicial pleading or filing that requests legal or equitable relief”).

107. *Sullivan v. Tex. Ethics Comm’n*, 551 S.W.3d 848 (Tex. App.—Austin 2018, pet. denied).

in district court (with the agency styled as the defendant).<sup>108</sup> The plaintiff, Sullivan, properly sought to realign the parties, thus converting himself into the defendant. Once the court ordered the realignment, the individual filed a TCPA motion to dismiss the “Commission’s” action.<sup>109</sup>

In another case, an appellee filed a TCPA motion to dismiss *an appeal* after filing a TCPA motion to dismiss in response to a TCPA motion to dismiss at the trial court level. If the reader finds this description too convoluted to follow, so did the judiciary. Justice Robert Pemberton,<sup>110</sup> who wrote a number of eloquently scathing opinions in TCPA cases, understatedly noted, after summarily dismissing the appellee’s arguments, that “[a]t the very least, we cannot conclude that the Legislature intended such a fundamental transformation of appellate courts’ jurisdiction and procedure without stronger textual support for that notion.”<sup>111</sup>

Ultimately, to close the virtually open-ended definition of “legal action,” the 86th Legislature amended it to exclude certain procedural actions, alternative dispute resolution proceedings, and post-judgment enforcement actions. The Legislature also included “declaratory relief” to clarify that the TCPA does apply to declaratory judgment actions.<sup>112</sup> The Third Court of Appeals in Austin previously held otherwise.<sup>113</sup>

Determining what is and what is not a “procedural action” may be a challenge for courts under the new definition of legal action. By its terms, an action or motion is not procedural if it “amend[s] or add[s] a claim for legal, equitable, or declaratory relief.”<sup>114</sup> As for filing TCPA motions to dismiss in response to another party’s motion for sanctions, the new law is clear that a “*post-judgment* enforcement action” for sanctions would not constitute a “legal action” subject to the TCPA.<sup>115</sup> One open question is whether applying the TCPA to a *pre-judgment* motion for sanctions is

108. *Id.* at 858 (stating a TCPA motion to dismiss could not be used to dismiss the same suit as the plaintiff filed after realignment of parties because the Legislature had provided a separate detailed set of procedures for resolving appeals of the Commission’s administrative findings);

109. *The Texas Anti-SLAPP Statute*, *supra* note 40, at 10.

110. Now former Justice of the Third Court of Appeals.

111. *Amini v. Spicewood Springs Animal Hosp., LLC*, 550 S.W.3d 843, 845 (Tex. App.—Austin 2018, no pet.).

112. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(6).

113. *See Craig v. Tejas Promotions, LLC*, 550 S.W.3d 287, 303 (Tex. App.—Austin 2018, pet. denied) (concluding “the district court did not err in denying the TCPA motion as to the declaratory claims . . .”).

114. CIV. PRAC. & REM. § 27.001(6)(A).

115. *Id.* § 27.001(6)(C) (emphasis added).

procedural, and thus not a legal action. The question would be moot if the courts find that such a motion contradicts Texas Government Code § 21.001(a), which provides: “A court has all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including authority to issue the writs and orders necessary or proper in aid of its jurisdiction.”<sup>116</sup>

The U.S. Fifth Circuit Court of Appeals recently held the old TCPA does not apply in federal diversity cases because its procedural framework conflicts with the Federal Rules of Civil Procedure.<sup>117</sup> In doing so, the court asserted the state statute requires a court to determine “by a preponderance of the evidence” whether an action relates to a party’s First Amendment rights and whether a plaintiff must meet each element of her claim by “clear and specific evidence.”<sup>118</sup> The court observed that “describing the rights afforded certain litigants under the TCPA as ‘substantive’ fails to address the uncertainty caused by the state statute’s ongoing conflict with federal rules.”<sup>119</sup> The Fifth Circuit ruling provides an important basis for concluding the newly revised language remains procedural in nature. If that view is accepted, litigants would be barred from filing, for example, TCPA motions to dismiss to dispose of a TCPA motion to dismiss. Whether the Legislature’s decision to strike references to the preponderance standard undercuts some of the Fifth Circuit’s rationale for concluding the TCPA is procedural remains to be seen.<sup>120</sup>

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116. TEX. GOV'T CODE ANN. § 21.001(a) was in effect in 2011 when the TCPA was enacted. *See also* TEX. CONST. art. V, § 1 (vesting judicial authorities in Texas); *Sullivan v. Tex. Ethics Comm'n*, 551 S.W.3d 848, 855 (Tex. App.—Austin 2018, pet. denied) (“A statute is presumed to have been enacted by the legislature with complete knowledge of the existing law and with reference to it. A legislative enactment covering a subject dealt with by an older law, but not repealing that law, should be harmonized whenever possible with its predecessor in such a manner as to give effect to both.” (quoting *Acker v. Texas Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990))).

117. *See generally* *Klocke v. Watson*, 936 F.3d 240, 242 (5th Cir. 2019) (“Resolving an issue that has brewed for several years in this circuit, we conclude that the TCPA does not apply to diversity cases in federal court . . .”).

118. *See id.* at 244 (analyzing the previous version of the TCPA). The 2019 revised version does not include the term “preponderance of evidence” and now requires dismissal “if the moving party establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law.” CIV. PRAC. & REM. § 27.005(d).

119. *Klocke*, 936 F.3d at 247.

120. However, the “clear and specific” evidence requirement in the statute remains unchanged. *See id.* at 246 (citation omitted) (“‘Clear and specific evidence’ must be, *inter alia*, ‘unambiguous, sure, or free from doubt.’ The standard, which lies somewhere between the state’s pleading baseline and the standard necessary to prevail at trial, in any event exceeds the plaintiff’s Rule 56 burden to defeat summary judgment.” (quoting *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015))).

The answer to whether a Rule 202<sup>121</sup> motion will be considered a “legal action” under the new definition will be anticipated with great interest; the stakeholders discussed the issue but made a conscious decision to leave that decision up to the courts.<sup>122</sup> Rule 202 provides for the taking of a deposition prior to filing a suit.<sup>123</sup> It “specifies two scenarios where [doing so would be] proper: investigating a potential suit, or preserving witness testimony in an anticipated suit.”<sup>124</sup> In the case of an anticipated lawsuit, the deposition may be granted only if the trial court finds that doing so “may prevent a failure or delay in justice.”<sup>125</sup> In contrast, when taken to investigate a potential claim or suit, a deposition may be granted only if the court finds that “the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure.”<sup>126</sup>

The Texas Supreme Court had an opportunity to resolve the issue of whether a Rule 202 motion is a “legal action” under the old TCPA but declined to do so. In *Glassdoor, Inc. v. Andra Group, LP*,<sup>127</sup> the petitioner, Andra Group, sought to depose Glassdoor, a jobs and recruiting website where users may anonymously post reviews of their current and former employers.<sup>128</sup> Andra stated “that it did ‘not anticipate any claims against Glassdoor’ but sought to ‘investigate potential claims for defamation or business disparagement’ against the ‘anonymous persons . . . who posted’” the reviews.<sup>129</sup> Andra further argued “that the likely benefit” it would gain from “the requested deposition outweighed the burden or expense.”<sup>130</sup> Glassdoor countered that such a deposition was a “legal action” under the TCPA, requiring Andra to make a prima facie case for its alleged defamation

121. TEX. R. CIV. P. 202.1.

122. The filed version of H.B. 2730 came closer to excluding Rule 202 as a legal action by excluding “a motion or action related to discovery made or take under the Texas Rules of Civil Procedure, including a motion to compel, or objection to discovery” and explicitly excluded sanctions and TCPA motions to dismiss as legal actions. Act of June 2, 2019, 86th Leg., R.S., ch. 378, § 1, sec. 27.001(6)(A), 2019 Tex. Sess. Law Serv. Ch. 378 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(6)).

123. TEX. R. CIV. P. 202.1.

124. Sean D. Jordan & Peter C. Hansen, *Pre-Suit Depositions Under Rule 202: A Survey of Hot Button Issues*, in 36TH ANNUAL PAGE KEETON CIVIL LITIGATION 1, 5 (2012).

125. TEX. R. CIV. P. 202.4(a)(1).

126. *Id.* § 202.4(a)(2).

127. *Glassdoor, Inc. v. Andra Grp., LP*, 575 S.W.3d 523 (Tex. 2019).

128. *Id.* at 525.

129. *Id.*

130. *Id.*



claims.<sup>131</sup> Andra responded that the TCPA does not apply to a Rule 202 proceeding because it did not fall under the (old) definition of “legal action” and even if it did, Andra had sufficiently “established the elements of its claims” to overcome the motion to dismiss.<sup>132</sup> The court dodged the issue by holding the statute of limitations barred the potential claims against Glassdoor and therefore the underlying Rule 202 petition was moot, dismissing the petition in its entirety.<sup>133</sup>

For TCPA lawyers and observers, the lack of clarity was frustrating because state appellate courts had conflicting rulings on whether Rule 202 was a legal action under the old TCPA. The First Court of Appeals in Houston ruled more than once that Rule 202 is not a legal action under the old TCPA.<sup>134</sup> In doing so, the court stated Rule 202 asserts no substantive claim or cause of action upon which relief can be granted and that “a successful Rule 202 petitioner ‘simply acquires the right to obtain discovery—discovery that may or may not lead to a claim or cause of action upon which relief can be granted.’”<sup>135</sup> That court challenged contrary rulings by other appellate courts asserting they must have read the definition of “legal action” in isolation since the statute requires a nonmovant to make a “prima facie case for each essential element of *the claim in question*” and instructs a court considering a dismissal motion to look at “the pleadings and supporting and opposing affidavits stating the facts on which the *liability* or *defense* is based.”<sup>136</sup> By comparison, the First Court of Appeals read the statute by applying the doctrine of “*ejusdem generis*,” noting the “list within [the] definition ‘is best characterized by observation that each element of this [enumerated] class is a procedural vehicle for vindication of a legal claim.’”<sup>137</sup>

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131. *Id.*

132. *Id.* at 526.

133. *Id.* at 531.

134. *See* *Caress v. Fortier*, 576 S.W.3d 778, 781 (Tex. App.—Houston [1st Dist.] 2019, pet. denied) (holding “the TCPA does not apply to Rule 202 proceedings . . .”); *see also* *Hughes v. Giammanco*, 579 S.W.3d 672, 678–79 (Tex. App.—Houston [1st Dist.] 2019, no pet.), *setting aside judgment, not vacating opinion*, No. 01-18-00771-CV, 2019 WL 3331124 (Tex. App.—Houston [1st Dist.] 2019) (following *Caress* as precedent for holding the same).

135. *Hughes*, 579 S.W.3d at 678; *see also* *In re Emergency Consultants*, 292 S.W.3d 78, 79 (Tex. App.—Houston [14th Dist.] 2007, orig. proceeding) (per curiam) (“Rule 202 does not require a potential litigant to expressly state a viable claim before being permitted to take a pre-suit deposition.”).

136. *Hughes*, 579 S.W.3d at 677 (emphasis added).

137. *Id.* at 680.

Other courts have held a Rule 202 petition was a legal action under the old TCPA. The Second Court of Appeals in Fort Worth asserted that merely looking at the plain language in the definition, a *petition*, is listed as a legal action.<sup>138</sup> The court further stated, “[R]ule 202, like all rules of civil procedure, was fashioned by the Texas Supreme Court as a means of ‘obtain(ing) a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law.’”<sup>139</sup> Following this logic, some courts have stated that “while a Rule 202 petition does not seek legal remedies in the traditional sense, it does seek an *equitable* remedy that falls within the ambit of a TCPA legal action.”<sup>140</sup>

In holding or implying a Rule 202 petition is a legal action under the old definition, some courts have allowed the deposition to go forward stating the nonmovant is only required to establish a *prima facie* case for the relief requested in the Rule 202 petition, not any claims it seeks to investigate.<sup>141</sup> In *Breakaway Practice, LLC v. Lowther*,<sup>142</sup> Breakaway Practice filed a Rule 202 petition seeking to depose the appellee, Robert Lowther, to investigate potential claims regarding derogatory statements the appellee allegedly made about Breakaway Practice on Facebook.<sup>143</sup> Lowther asserted the Rule 202 petition was filed in response to the exercise of his rights of free speech and association. In response, Breakaway Practice disputed its Rule 202 petition was based on, related to, or was in response to Lowther’s communications. Regardless, Breakaway argued, it met its burden to defeat the TCPA motion to dismiss by presenting a *prima facie* case for its Rule 202 petition that the likely benefit of the requested deposition outweighed the burden of expense of the procedure.<sup>144</sup> “To show it established a *prima facie* case, Breakaway

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138. *DeAngelis v. Protective Parents Coal.*, 556 S.W.3d 836, 848 (Tex. App.—Fort Worth 2018, no pet.).

139. *Id.* at 848.

140. *In re Krause Landscape Contractors, Inc.*, 595 S.W.3d 831, 836 (Tex. App.—Amarillo 2020, no pet.) (emphasis added).

141. *See Breakaway Practice, LLC v. Lowther*, No. 05-18-00229-CV, 2018 WL 6695544, at \*1 (Tex. App.—Dallas Dec. 20, 2018, pet. denied) (deciding Breakaway met its burden in establishing a *prima facie* case in its Rule 202 petition); *see also Glassdoor, Inc. v. Andra Grp., LP*, 575 S.W.3d 523, 526–27 (Tex. 2019) (summarizing how the Dallas Court of Appeals only required a *prima facie* case for a Rule 202 petition); *cf. In re Krause Landscape Contractors, Inc.*, 595 S.W.3d at 838–39 (stating nonmovant’s conclusory statements in his petition and response are insufficient to establish a *prima facie* case and “the benefit of the pre-suit depositions would outweigh their costs”).

142. *Breakaway Practice, LLC v. Lowther*, No. 05-18-00229-CV, 2018 WL 6695544 (Tex. App.—Dallas Dec. 20, 2018, pet. denied).

143. *Id.* at \*1.

144. *Id.*

[Practice] relie[d] on its verified Rule 202 petition and Lowther's attached Facebook post."<sup>145</sup> The court concluded Breakaway Practice had met its burden to establish a prima facie case. Thus, the trial court erred in dismissing the petition.<sup>146</sup>

Rule 202 is a court-created creature,<sup>147</sup> and courts will determine whether it is deemed "procedural" under the new TCPA definition. On the one hand, the word "petition" remains in both the TCPA definition of legal action and the rule. On the other hand, the rule is located in the Texas Rules of Civil Procedure and invokes the procedures governing discovery. Notably, a Rule 202 petition may seek discovery from a person who is not the target of anticipated litigation—meaning discovery granted under the rule may not present a burden on the potential defendant<sup>148</sup> who may later have the benefit of the TCPA's protections should a suit be filed as a result of that discovery.

Although a successful Rule 202 petition could result in the target incurring some unnecessary litigation costs, discovery under the rule might also lead the petitioner to conclude whether her potential claim is timely under the applicable statute of limitations. The rule itself contains language requiring a balance between guarding against injustice and the cost-benefit ratio of allowing pre-suit discovery. A Rule 202 petition cannot be used to investigate potential claims that are not ripe<sup>149</sup> or that would be beyond the jurisdiction of the court petitioned.<sup>150</sup> Moreover, "courts must strictly limit and carefully supervise pre-suit discovery"<sup>151</sup> under Rule 202. Given the argument that courts have fully developed detailed procedures for regulating the use of Rule 202 and that the rule may serve similar purposes to that of the TCPA, courts could construe the new definition of "legal action" to

145. *Id.* at \*3; *see also* Fawcett v. Grosu, 498 S.W.3d 650, 660 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (recognizing a nonmovant may rely on pleadings and attachments to establish prima facie case).

146. *Breakaway Practice, LLC*, 2018 WL 6695544, at \*3.

147. *See* TEX. CONST. art. V, § 31(b) ("The Supreme Court shall promulgate rules of civil procedure for all courts not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice . . ."); *see also* TEX. GOV'T CODE ANN. § 22.004(e) ("So that the supreme court has full rulemaking power in civil actions, a rule adopted by the supreme court repeals all conflicting laws and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed.")

148. TEX. R. CIV. P. 202.1(a); *see also In re Elliott*, 504 S.W.3d 455, 465 (Tex. App.—Austin 2016, orig. proceeding) (stating a court may grant a Rule 202 petition before a suit is ever filed).

149. *In re DePinho*, 505 S.W.3d 621, 623 (Tex. 2016).

150. *Id.* at 623.

151. *In re Wolfe*, 341 S.W.3d 932, 933 (Tex. 2011).

exclude Rule 202 petitions from TCPA motions to dismiss. The Legislature did not definitively address these questions. Thus, it will be up to the courts to decide the issue.

C. *Focusing on Truly Public Concerns*

**The old law:**

“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.<sup>152</sup>

**The new law:**

“Matter of public concern” means a statement or activity *regarding*:

- (A) *a public official, public figure, or other person who has drawn substantial public attention due to the person’s official acts, fame, notoriety, or celebrity;*
- (B) *a matter of political, social, or other interest to the community; or*
- (C) *a subject of concern to the public.*<sup>153</sup>

The change to the definition of “matter of public concern” is the most significant amendment made by the 2019 TCPA legislation. While it is beyond the scope of this Article to fully exhaust the history, development, and application of the concept—which for decades has figured prominently in cases involving privacy, libel, government employee speech, privileges,

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152. Act of June 17, 2011, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961 (amended 2019).

153. TEX. CIV. PRAC & REM. CODE ANN. § 27.001(7)(A)–(C) (emphasis added).

and anti-SLAPP statutes<sup>154</sup>—this Article provides some guidance for courts construing the statute and for advocates either prosecuting or defending a claim.

First, to understand the appropriate use of the new TCPA, one must understand: (1) when a matter of public concern is required to be present in the communication or activity at issue; or (2) when the Act may be invoked even in the absence of a matter of public concern regarding the communication or activity. Second, understanding the origins of the definition may prove useful for those moving to dismiss a claim under Section 27.003, and those opposing such actions. Third, studying the precise language of the new definition, especially in comparison to the old law, will illuminate its intended scope. Finally, the authors hope this Section will help parties and the courts determine when a communication or activity may (or may not) involve a matter of public concern.

**Public concern required (or not):** Under the new law, absent an exception,<sup>155</sup> a TCPA motion to dismiss applies to a legal action “based on or in response to” an exercise of the right of association, free speech, or petition. By definition, to be subject to a motion to dismiss in a case involving those rights, a claim must:

- When based on the exercise of the right of association, meet one of two criteria:
  - (1) the exercise must be related to a governmental proceeding; or
  - (2) the exercise must be related to a *matter of public concern*.<sup>156</sup>
- When based on the exercise of the right of free speech, involves a communication “made in connection with a *matter of public concern*.”<sup>157</sup>

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154. Clay Calvert, *Defining “Public Concern” After Snyder v. Phelps: A Pliable Standard Mingles with News Media Complicity*, 19 VILL. SPORTS & ENT. L.J. 39, 41–42 (2012).

155. See CIV. PRAC & REM. § 27.010(a) (providing exceptions to the application of Chapter 27). In addition, by defining the term “legal action” in Section 27.001(6) to exclude certain procedural, alternative dispute, and post-judgment matters, the legislature effectively carved out more exceptions from the chapter’s application.

156. *Id.* § 27.001(7) (emphasis added). As to be discussed *infra*, these new, alternative prongs actually have the effect of limiting the definition relative to the prior statute, in addition to its scope being changed by the amended definition of “matter of public concern.”

157. *Id.* § 27.001(3) (emphasis added). While the language of this provision is unchanged from the prior statute, read with the new definition of “matter or public concern,” the chapter’s purpose provision was given new relevance.

- When based on the exercise of the right to petition, entail communications involving any one of thirteen described activities, one of which is “a communication in or pertaining to . . . 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.”<sup>158</sup>

On the other hand, a motion to dismiss under Section 27.003 may be made if a legal action “arises from any act of that party in furtherance of the party’s communication or conduct described by Section 27.010(b),” sometimes referred to as the “media provision.”<sup>159</sup> In a case where the media provision applies, there is no requirement that the communication or conduct be in connection with a matter of public concern, making the media application potentially broader than non-media claims brought under the TCPA.

Similarly, a matter of public concern is not required to be present for a defendant to move to dismiss under Section 27.003 if the Section 27.010(c) provision applies, which addresses domestic or family violence.<sup>160</sup> Under Section 27.010(c), the chapter “applies” if a legal action is “based on or in response to a public or private communication” and the legal action is “against a victim or alleged victim of family or dating violence as defined in Chapter 71, of the Family Code, or” certain offenses against the person defined in Chapters 20, 20A, 21, or 22 of the Penal Code.<sup>161</sup>

A matter of public concern is not expressly required under the “right to petition” definition. However, the very nature of the described activities in the provision will invariably involve matters of public concern. For example, Section 27.001(4)(A)(iv) captures “a legislative proceeding, including a proceeding of a legislative committee,”<sup>162</sup> which by its very nature involve discussions of matters of public concern.

***Origins of the definition.*** Fundamentally, the TCPA and other states’ anti-SLAPP statutes<sup>163</sup> provide methods of dismissing cases that are not available in other types of civil litigation. That is because “[S]peech on

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158. *Id.* § 27.001(4)(A)(ix) (emphasis added). This provision is unchanged from the prior statute but must now be read in conjunction with the new definition of “matter of public concern.”

159. *Id.* § 27.003(a). See *infra* Part VI.A.

160. *Id.* § 27.010(c).

161. *Id.*

162. *Id.* § 27.001(4)(A)(iv).

163. Wasser, *supra* note 7.

'matters of public concern' . . . is 'at the heart of the First Amendment's protection.'"<sup>164</sup> To be successful, suits against those speaking on issues of public concern, or brought by those in the public eye against those who speak about them, are subjected to a higher constitutional bar in civil litigation.<sup>165</sup> Legislatures have enacted anti-SLAPP regimes to "encourage" the exercise of those rights and "safeguard" those who may be victimized by intimidation through litigation.

As explained in Section III of this Article, prior to the 2019 amendments, courts held the TCPA's definition of "matter of public concern" was exceedingly broad—extending even beyond protecting constitutional rights, despite its purpose clause—such that advocates could plead into the statute's coverage of a wide array of activities.<sup>166</sup> Although its purpose provision stated—and still states—the chapter was intended to "encourage and safeguard the *constitutional* rights . . . to petition, speak freely, associate freely, and otherwise participate in government,"<sup>167</sup> the Texas Supreme Court and courts of appeals have repeatedly held the old law applied to cases far beyond those simply protecting constitutional rights.<sup>168</sup> While

164. *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011) (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–759 (1985)).

165. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964) (holding "the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct"); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 (1974) (applying the *New York Times* standard to a case involving statements made in a magazine).

166. Senator Bryan Hughes, sponsor of House Bill 2730 stated: "Under current law, lawyers and judges can apply the definition to almost any type of human activity. . . . And this definition is partly why this statute has been litigated more than any other statute on our books." S.J. of Tex., 86th Leg., R.S. 2011, 2024 (2019).

167. CIV. PRAC. & REM. § 27.002 (emphasis added). House Bill 2730 did not amend this provision.

168. *See Youngkin v. Hines*, 546 S.W.3d 675, 680 (Tex. 2018) ("Substituting the statutory definitions for the defined terms, we see that the TCPA applies to a legal action against a party that is based on, related to, or in response to the party's making or submitting of a statement or document in or pertaining to a judicial proceeding."); *see also Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 892 (Tex. 2018) ("The statutory definition is not fully coextensive with the constitutional free-speech right protected by the First Amendment to the U.S. Constitution and article I, section 8 of the Texas Constitution."); *Abatecola v. 2 Savages Concrete Plumbing, LLC*, No. 14-17-00678-CV, 2018 WL 3118601, at \*4–5 (Tex. App.—Houston [14th Dist.] June 26, 2018, pet. denied) (mem. op.) (stating the TCPA is "very broadly applied" and explaining its application); *Price v. Buschemeyer*, No. 12-17-00180-CV, 2018 WL 1569856, at \*2 (Tex. App.—Tyler Mar. 29, 2018, pet. denied) ("The TCPA does not discriminate between public and private communications as long as they are made in connection with a matter of public concern." (citing *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (per curiam))); *Collins v. Collins*, No. 01-17-00817-CV, 2018 WL 1320841, at \*3 (Tex.

effectively reducing the chapter's sweep, the Legislature re-focused the TCPA by more closely aligning the definition of a "matter of public concern" with the constitutional rights enumerated in the purpose provision.<sup>169</sup>

House Bill 2730, as introduced, would have eliminated the definition of "matter of public concern" entirely and limited the TCPA to legal actions based on or in response to the exercise of a party's speech, association or petition rights "as those rights are provided by the constitutions of this state and the United States, as applied by the courts of this state and the United States."<sup>170</sup> While the Legislature removed that language, the final bill made the TCPA much closer to the filed bill's constitution-only approach as compared to the old law.

Many states' anti-SLAPP laws have taken the approach of expressly tying anti-SLAPP laws to the federal and state constitutions.<sup>171</sup> Those states' laws have clearly directed courts to tether their statutory constructions to limit the coverage of their anti-SLAPP statutes to state and federal constitutionally protected speech.<sup>172</sup> That approach allows courts to deny the protection of their anti-SLAPP statutes to speech that is not constitutionally protected, even in fact situations where protected and

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App.—Houston [1st Dist.] Mar. 15, 2018, pet. denied) (mem. op.) (recognizing the expansive view of the TCPA extending past constitutional rights).

169. House Comm. on the Judiciary and Civ. Jurisprudence, Bill Analysis, Tex. H.B. 2730, 86th Leg., R.S. (2019) [hereinafter Tex. H.B. 2730 Bill Analysis] ("[C]ertain statutory provisions relating to expedited dismissal procedures for lawsuits involving the exercise of free speech, the right of association, and the right to petition may lend themselves to unexpected applications because they are overly broad or unclear. C.S.H.B. 2730 seeks to remedy this issue by clarifying the scope and applicability of those provisions.").

170. Tex. H.B. 2730, 86th Leg., R.S. (2019). To see the bill as filed, visit <https://capitol.texas.gov/tlodocs/86R/billtext/pdf/HB02730I.pdf#navpanes=0> [https://perma.cc/4ASW-CB9X].

171. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-751 (2006); ARK. CODE ANN. § 16-63-501 (West 2005); CAL. CIV. PROC. CODE. § 425.16 (West 2015); CONN. GEN. STAT. ANN. § 52-196a (West 2019); FLA. STAT. ANN. § 768.295 (West 2015); GA. CODE ANN. § 9-11-11.1 (West 2016); 735 ILL. COMP. STAT. ANN. 110/1 (West 2007); IND. CODE ANN. § 34-7-7-3 (West 2020); LA. CODE CIV. PROC. ANN. art. 971 (2012); ME. REV. STAT. ANN. tit. 14, § 556 (2012); MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (West 2010); MASS. GEN. LAWS ANN. ch. 231, § 59H (West 1994); 9 R.I. GEN. LAWS ANN. § 9-33-2 (West 2020); TENN. CODE ANN. § 4-21-1003 (West 1997); VT. STAT. ANN. tit. 12, § 1041 (West 2005); VA. CODE ANN. § 8.01-223.2 (West 2017).

172. *See, e.g.*, Flatley v. Mauro, 139 P.3d 2, 9 (Cal. 2006) ("The [California] Anti-SLAPP statute does not apply to speech and petitioning activity that is illegal as a matter of law and, therefore, not constitutionally protected") (capitalization altered).



unprotected speech are mixed.<sup>173</sup> Under the new TCPA, the definition of “matter of public concern” is not expressly tied to constitutionally protected speech, although the definition is stated in terms applying constitutional principles. Because the language of the new definition may cover fact situations beyond constitutionally protected speech, ultimately only time will tell the extent to which the statute will be applied in the future.

The new definition of matter of public concern was inserted into the 2019 bill as it passed out of the House Committee<sup>174</sup> and remained unchanged through the subsequent legislative process and into law. In a colloquy with Senator Kirk Watson (D-Austin), bill sponsor Senator Bryan Hughes (R-Mineola) stated the Legislature’s intent before the full Senate as it unanimously passed House Bill 2730:<sup>175</sup> courts applying the new definition should look to the Supreme Court’s 2011 decision in *Snyder v. Phelps*<sup>176</sup> and *FilmOn.com v. DoubleVerify (Filmon)*,<sup>177</sup> a case construing the California anti-SLAPP statute, for guidance.<sup>178</sup>

Senator Hughes stated: “The public figure issue is taken from a recent California Supreme Court case called *Filmon v. DoubleVerify*.”<sup>179</sup> He also observed: “California’s anti-SLAPP statute is older than ours and is considered the model, after it was also reformed some years ago.<sup>180</sup> This is very important because the [new Texas] statute will have established

173. See *Baral v. Schnitt*, 376 P.3d 604, 614 (Cal. 2016) (holding “when the defendant seeks to strike particular claims supported by allegations of protected activity that appear alongside other claims within a single cause of action, the motion cannot be defeated by showing a likelihood of success on the claims arising from unprotected activity”).

174. See Tex. H.B. 2730 Bill Analysis, *supra* note 168.

175. Parties who were opposed to the original bill have agreed with the intention *Snyder* should supply the principles informing the definition of “matter of public concern.” PROTECT FREE SPEECH COAL., CONCERNS ABOUT CSHB 2730 (an undated document available from the House author’s office provided to the House Committee on the Judiciary and Civil Jurisprudence during consideration of the legislation).

176. *Snyder v. Phelps*, 562 U.S. 443 (2011).

177. *FilmOn.com Inc. v. DoubleVerify Inc.*, 439 P.3d 1156 (Cal. 2019).

178. *Id.* at 1164.

179. S.J. of Tex., 86th Leg., R.S. 2011, 2024 (2019).

180. *Id.*; see also 2003 Cal. Legis. Serv. Ch. 338 (S.B. 515) (current version at CAL. CIV. PROC. CODE § 425.17(a)) (“The Legislature finds and declares that there has been a disturbing abuse of Section 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16. 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 or Section 425.16.”).

jurisprudence to guide Texas courts on how to apply the new law.”<sup>181</sup>

In *Filmon*, both the lower appellate court and the California Supreme Court relied on the well-established principle cited in the California anti-SLAPP statute regarding the “public issue” prong. In California, “public issue” cases include cases where the statement or activity precipitating the underlying cause of action “was [about] ‘a person or entity in the public eye.’”<sup>182</sup>

Section 27.001(7)(A) of the new Texas law addresses communications regarding those in the public eye—a recognition of the constitutional barriers to litigation imposed on certain individuals, including public officials and public figures. This new language is somewhat broader than the comparable provision in the prior law. The terms “public official”<sup>183</sup> and “public figure”<sup>184</sup> have established legal meanings that *may* not encompass all of those now included under the new law’s additional reference to “other person who has drawn substantial public attention due to the person’s official acts, fame, notoriety, or celebrity.”<sup>185</sup>

In Section 27.001(7)(A), the Legislature specifically requires there be “substantial public attention” drawn to a person *on the basis of their actions*. This choice of language demonstrates the Legislature’s intent to narrow the definition’s reach by steering away from applying this element to essentially private concerns. There was no such express limitation in the prior provision.<sup>186</sup> The new TCPA’s focus on the attention drawn by a person’s public acts, rather than her mere status as a public official or public figure, is reminiscent of the Texas Supreme Court’s approach in *Foster v. Laredo Newspapers, Inc.*<sup>187</sup> *Foster* construed a provision of the Texas libel statute<sup>188</sup> applicable to public officials. Given the facts of the case, the Court distinguished between an elected official’s public duties and the private consulting activities at issue to determine he was not a public official for

181. S.J. of Tex., 86th Leg., R.S. 2011, 2024 (2019).

182. *FilmOn.com Inc.*, 439 P.3d at 1162.

183. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

184. *See generally* *Hutchison v. Proxmire*, 443 U.S. 111 (1979); *Wolston v. Reader’s Digest Ass’n, Inc.*, 443 U.S. 157 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

185. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7)(A).

186. *See* Act of June 2, 2019, 86th Leg., R.S., ch. 378, § 1, sec. 27.001(7)(A), 2019 Tex. Sess. Law Serv. 378 (current version at CIV. PRAC. & REM. § 27.001(7)(A)) (adding the requirement of “substantial public attention”).

187. *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809 (Tex. 1976).

188. *Id.*

purposes of the statute, which also has a public concern element.<sup>189</sup>

The new statutory language in Sections 27.001(7)(B) and (C) is nearly identical to language in the *Snyder* Court's holding:

Speech deals with matters of public concern when it can “be fairly considered as relating to any matter of political, social or *other concern to the community*” or when it “is a subject of legitimate news interest; that is, a subject of general interest and of value and *concern to the public*.”<sup>190</sup>

Section 27.001(7)(B) is a virtual recitation of the *Snyder* Court's phrase “political, social or other concern to the community,”<sup>191</sup> which is based on *Connick v. Myers*,<sup>192</sup> a case involving government employee speech.<sup>193</sup>

Section 27.001(7)(C), is a truncated version of language the *Snyder* Court derived from *City of San Diego v. Roe*,<sup>194</sup> which also involved a government employer-employee dispute, but relied heavily on precedents involving media defendants.<sup>195</sup> Section 27.001(7)(C) omits *Snyder*'s references to “legitimate news interest,” “general interest” and “value . . . to the public.”<sup>196</sup> Representatives from the media had concerns the modifier “legitimate” before “news interests,” for example, would create an obvious avenue to dispute or attack whether the content of their news was, in fact, “legitimate.”<sup>197</sup> This same concern has been expressed in academic writings following *Snyder*.<sup>198</sup>

Translating the prose of judicial opinions into statutory language is seldom a precise operation. Legislatures simply have different considerations in drafting statutes than courts do in writing opinions. For

189. *Id.* at 817. *See also* CIV. PRAC. & REM. §§ 73.002(a), 73.002(b)(1)(D), 73.002(b)(2), 73.005 (clarifying which activities are privileged and outlining the ruling procedures).

190. *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (emphasis added) (citations omitted).

191. *Id.*

192. *Connick v. Meyers*, 461 U.S. 138 (1983).

193. *Id.* at 140.

194. *City of San Diego v. Roe*, 543 U.S. 77 (2004) (per curiam).

195. *Id.*

196. TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7)(C).

197. *See* M.G. v. Time Warner, Inc., 107 Cal. Rptr. 2d 504, 513 (Cal. Ct. App. 2001) (“Intensely personal or intimate revelations might not, in a given case, be considered newsworthy, especially where they bear only slight relevance to a topic of legitimate public concern.”); *cf.* Gaeta v. Home Box Office, 645 N.Y.S.2d 707, 710 (N.Y. 1996) (concluding the HBO program featuring plaintiff concerned a matter of public interest).

198. *See* *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (defining a matter of public concern as one concerning a “legitimate news interest”); *see also* Calvert, *supra* note 153, at 56–57 (discussing problems arising from the term “legitimate”).

example, statutes contain no dicta, and cannot rely on pages of caveats and nuance for their complete meaning. Also, in many cases, the language of judicial opinions, does not incorporate the conventions contained in legislative drafting manuals.<sup>199</sup>

Furthermore, the reference to “legitimate news interest” was rendered unnecessary by the inclusion of Section 27.010(b), which effectively applies the TCPA to *any* journalistic work. Perhaps more importantly, the omission also protects judges, journalists, publishers, and the public from courts making decisions regarding what interest in news is “legitimate” or what might be deemed “fake.” “In the American legal system, newsworthiness is . . . ‘a wide-reaching concept.’”<sup>200</sup> “There is, in fact, ‘no universally accepted test to determine whether a particular fact or incident is newsworthy and therefore constitutionally protected . . . .’”<sup>201</sup> In addition, the *Snyder* formulation’s inclusion of “general interest” is unnecessary because the statutory language already requires “interest *to the community*” or “concern *to the public*.”<sup>202</sup> Adding a general interest phrase to the new statutory language would have simply been redundant.<sup>203</sup>

Finally, adding the words “value and” before the phrase “concern to the public” in Section 27.001(7)(C) might have incentivized advocates to argue that two elements must be present—both value *and* concern—for that subsection to apply. If one is concerned about something, one has attached value to that something—whether positive or negative. People are not *concerned* with things that have no value to them. The Legislature simply avoided future arguments about whether something must be *both* valued *and* of concern to be covered by the definition and, again, avoided redundant language.

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199. See, e.g., *Texas Legislative Council Drafting Manual*, TEX. LEGIS. COUNCIL 1 (2018), <https://tlc.texas.gov/docs/legref/draftingmanual-86.pdf> [<https://perma.cc/K2BY-FNG7>] (providing guidelines for drafting style and usage).

200. Calvert, *supra* note 153, at 47 (citing Paul M. Schwartz & Karl-Nikolaus Peifer, *Prosser’s Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept*, 98 CALIF. L. REV. 1925, 1971 (2010)).

201. *Id.*

202. See TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7)(B)–(C) (emphasis added) (requiring “interest to the community” or “a subject of concern to the public” to deem a matter one of public concern).

203. See Calvert, *supra* note 153, at 46–47 (“[A] newsworthiness standard ‘involves essentially the same inquiry as a ‘public concern’ test.” (quoting Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515, 580 (2007))).

At first glance, the new Texas definition may appear circular—something is a matter of public concern if it is of concern to the public. However, the importance of the new statute's repeated invocation of concern “to the public” can be better understood in the context of *Snyder*, including prior cases<sup>204</sup> and subsequent critical review.<sup>205</sup> “[N]ot all speech is of equal First Amendment importance,’ however, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous.”<sup>206</sup> Rather, “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”<sup>207</sup> It is this special protection that anti-SLAPP laws appropriately provide.

Given its stated effort to clarify and narrow the statute, the irony of the Legislature's reliance on *Snyder* as the source of the new definition is underscored by the fact that, under *Snyder*'s formulation, “the boundaries of the public concern test are not well-defined.”<sup>208</sup> It should be no surprise that statutory drafting in this area would be problematic; the definitional problem was engrained well before *Snyder*, which was decided in 2011.<sup>209</sup> As recognized in a 1988 law review article on the subject: “[I]t is impossible to address all the circumstances in which the question of speech on a matter of public concern may arise. . . . [E]ven under existing precedent there is substantial contradiction, and there is no reason to anticipate this conflict will subside over time.”<sup>210</sup> The article includes lists of cases, as of its publication, holding various matters to be of public concern and others to

204. See, e.g., *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976) (suggesting a seventeen-month long, high-profile divorce, complete with salacious allegations regarding very wealthy and prominent people, was not a matter of public concern).

205. For an excellent (and critical) review of the development of the public concern concept, its relationship to public figure analysis, and the requirement in certain cases to prove actual malice, see Mark Strasser, *What's It to You: The First Amendment and Matters of Public Concern*, 77 MO. L. REV. 1083 (2012).

206. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (alteration in original) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)); see *Connick v. Myers*, 461 U.S. 138, 145–47 (1983) (discussing the classification of “matters of public concern”).

207. *Snyder*, 562 U.S. at 452 (quoting *City of San Diego v. Roe*, 543 U.S. 77, 83 (2004)).

208. *Id.*

209. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 79 (1971) (Marshall, J., dissenting) (“The plurality’s doctrine also threatens society’s interest in protecting private individuals from being thrust into the public eye by the distorting light of defamation. This danger exists since all human events are arguably within the area of ‘public or general concern.’”)

210. Stephen Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43, at 75–76 (1988).

be merely private.<sup>211</sup> However, courts and practitioners may find these lists useful, if not entirely satisfying—although readers must review each example in light of subsequent cases discussing the concept.

Regardless of the difficulties presented for litigants and courts, the notion that there are matters of public concern “suggests the flipside that some information must be of private concern.”<sup>212</sup> To illustrate the distinction, *Snyder* cited two important examples of cases in which the Court held that the communications at issue involved purely private concerns. From these examples, advocates and courts may extract some principles to draw lines between public and private concerns.

First, in *Snyder*, the Court held the defendants’ speech related to matters of public concern and contrasted *Snyder*’s facts—the Westboro Baptist Church protests on public property at a fallen soldier’s funeral regarding, *inter alia*, homosexuality in the military and scandals within the Catholic Church<sup>213</sup>—with those in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,<sup>214</sup> in which the Court held the distribution of an individual company’s credit reports to only a handful of private subscribers was not a matter of public concern.<sup>215</sup> Second, the Court cited *City of San Diego v. Roe*, in which the Court found a government-employer’s actions against one of its employees who appeared in a sexually explicit video did not amount to regulating communication about a public concern.<sup>216</sup>

In addition, the *Snyder* Court set out broad techniques the courts should follow in determining whether a given communication relates to a matter of public concern:

Deciding whether speech is a matter of public concern requires us to examine the “content, form, and context” of that speech, “as revealed by the whole record.” . . . In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.<sup>217</sup>

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211. *Id.* at 59 n.100, 74 n.209.

212. *See* Calvert, *supra* note 153, at 47.

213. *Snyder*, 562 U.S. at 448.

214. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

215. *Id.* at 761–62.

216. *City of San Diego v. Roe*, 543 U.S. 77, 84 (2004) (per curiam).

217. *Snyder*, 562 U.S. at 453–54 (quoting *Dun & Bradstreet, Inc.*, 472 U.S. at 761). Interestingly, the California Supreme Court in *Filmon* engaged in analysis nearly identical to its language in *Snyder* regarding the “public issue” terminology in the state’s anti-SLAPP statute, except *Filmon* referred to

In *Brady v. Klentzman*,<sup>218</sup> the Texas Supreme Court demonstrated it understands the First Amendment analysis compelled by *Snyder* regarding matters of public concern and how to apply that analytical framework to the facts of a case before it.<sup>219</sup> *Klentzman* involved the performance of a local police chief in relation to his department's involvement with his son's alleged criminal conduct.<sup>220</sup> The opinion cites *Snyder* and quotes it extensively, including the language borrowed by the Texas Legislature for House Bill 2730.<sup>221</sup>

In a 2019 TCPA case construing the former definition of "matter of public concern," the court in *Creative Oil & Gas LLC v. Lona Hilla Ranch LLC*<sup>222</sup> quoted *Klentzman* (omitting the citation to *Snyder* but quoting its key language): "The phrase 'matter of public concern' commonly refers to matters 'of political, social, or other concern to the community,' as opposed to purely private matters."<sup>223</sup> The Legislature's inclusion of *Snyder*'s language in the 2019 anti-SLAPP reform legislation should be a clear signal to Texas courts that, like *Klentzman* and *Creative Oil & Gas*, they are to apply established methods of determining what is and what is not a matter of public concern.<sup>224</sup>

***The definition's plain language.*** Texas courts have long held that plain statutory language is the binding factor in determining legislative intent; unless the statutory language is ambiguous, courts are not to resort to extrinsic indices of legislative intent,<sup>225</sup> such as statements in the journal of a legislative body.<sup>226</sup> Were a court to find the new definition ambiguous, it could consider extrinsic sources of legislative intent, such as

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the precedents construing California's law rather than citing the U.S. Supreme Court precedents *Snyder* relied upon and other federal constitutional cases. See *FilmOn.com Inc. v. DoubleVerify Inc.*, 439 P.3d 1156, 1160 (Cal. 2019) (citing California statutes and cases in its discussion surrounding "public issue").

218. *Brady v. Klentzman*, 515 S.W.3d 878 (Tex. 2017).

219. *Id.* at 884.

220. *Id.* at 881–82.

221. *Id.* at 884.

222. *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127 (Tex. 2019).

223. *Id.* at 135 (citing *Brady*, 515 S.W.3d at 884).

224. See *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (providing the preexisting framework for the Texas Legislature's definition of "public concern"); *Creative Oil & Gas, LLC*, 591 S.W.3d at 135 (relying on *Snyder* to analyze "matters of public concern"); *Brady*, 515 S.W.3d at 884.

225. *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011); *Fleming Foods of Texas, Inc. v. Rylander*, 6 S.W.3d 278, 282–83 (Tex. 1999).

226. See *Tex. Health Presbyterian Hosp. of Denton v. D.A.*, 569 S.W.3d 126, 136 (Tex. 2018) ("[S]tatements explaining an individual legislator's intent cannot reliably describe the legislature's intent.").

Senator Hughes's statement, and other factors.<sup>227</sup>

Although informative, Senator Hughes' explanation to his Senate colleagues was also precisely consistent with the statute's plain language. While the new definition of matter of public concern appears less concrete than the eleven separate categories under the old law, the plain language of the new definition is unambiguous when: (1) compared to the extraordinary range of the old law; (2) followed by the guidance of *Snyder*; (3) considered in harmony with the chapter's purpose provision, and; (4) defined in terms of the constitutional rights expressly sought to be "encourage[ed] and safeguard[ed]"<sup>228</sup> by the chapter.

It will be helpful to contrast the language of the new definition with the old law to derive the Legislature's intention to emphasize *the public* within "public concern" and reduce the definition's scope.

The old law provided that if an issue was "related to" one of eleven specified subjects, the issue was a matter of public concern.<sup>229</sup> Because the old law provided that a matter of public concern "included" one of the eleven specified subjects, based on the definition of the word "includes,"<sup>230</sup> the list was not exclusive. The Legislature narrowed the definition by striking the words "related to" from the old definition because courts have held that phrase to be the most inclusive in comparison to phrases such as "arising out of" and "based on."<sup>231</sup> Further narrowing was achieved by also striking the word "includes," substituting the requirement that a statement or activity must be "regarding" one of the three subject matter

227. See TEX. GOV'T CODE ANN. § 311.023 (listing permissible factors to be considered when construing statutes).

228. TEX. CIV. PRAC. & REM. CODE ANN. § 27.002.

229. Taylor, *supra* note 41, at 2.

230. See GOV'T § 311.005(13) ("Includes' and 'including' are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded."); see also *Cunningham v. Waymire*, No. 14-17-00883-CV, 2019 WL 5382597, at \*7 (Tex. App.—Houston [14th Dist.] Oct. 22, 2019, no pet.) ("The TCPA does not require that the statements specifically 'mention' any of the listed matters of public concern, 'nor does it require more than a 'tangential relationship' to same; rather, the TCPA applies so long as the defendant's statements are 'in connection with' 'issue[s] related to' any of the matters of public concern listed in the statute." (quoting *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 900 (Tex. 2017) (per curiam) (quoting TCPA § 27.001(3), (7)))).

231. *Robert B. James, DDS, Inc. v. Elkins*, 553 S.W.3d 596, 604 (Tex. App.—San Antonio 2018, pet. denied) ("Conversely, the Legislature declined to use a broader qualifying phrase like 'relates to.' In the insurance contract exemption, the Legislature purposely used the phrase 'arising out of' and not 'based on,' 'brought under,' or 'relates to.'" (quoting *Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 325–26 (Tex. 2017)).



areas listed in the new definition.<sup>232</sup> These changes to the TCPA, among others, should be sufficient to override the Texas Supreme Court's "directive that a communication's 'tangential relationship' to a matter of public concern is sufficient to establish exercise of the right of free speech"<sup>233</sup> or other rights dependent on the definition of public concern for coverage under the chapter. In the future, the new definition will require a far more direct connection between the communication at issue and the claim in the suit, especially considering other parts of the TCPA in which the Legislature struck "related to" in favor of a more specific nexus between the claims in the suit and any communication alleged to provide the basis for the claims.<sup>234</sup>

The language of the eleven subject matters in the prior definition can be categorized as those having no express public interest element, those with implied public interest elements, and those having express public interest elements.

Two of the subjects—"health or safety"—contained no express or implied language that the issue must be of interest to the public or concern to the community. For example, the plain language of the statute ("health") allowed a dispute regarding payment of a hospital's lien interest in one *individual's* recovery in a personal injury lawsuit to be within the definition of "public concern."<sup>235</sup> The health and safety realm also included a bizarre private family feud which hardly affected the public.<sup>236</sup> These types of examples illustrate the extraordinary breadth of the construction given to the prior law in the absence of language emphasizing the public interest element of the communication.

232. Compare Act of June 17, 2011, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961 (amended 2019) (proposing "'Matter of public concern' includes an issue related to" five potential circumstances), with CIV. PRAC. & REM. § 27.001(7) (codifying a "'matter of public concern' means a statement or activity regarding" three listed circumstances).

233. Cook v. Simmons, No. 05-19-00091-CV, 2019 WL 5884426, at \*3 (Tex. App.—Dallas Nov. 12, 2019, pet. filed) (mem. op.).

234. See *infra* Part VII.

235. See E. Tex. Med. Ctr. v. Hernandez, No. 12-17-00333, 2018 WL 2440508, at \*3 (Tex. App.—Tyler May 31, 2018, pet. denied) (mem. op.) ("The filing of the hospital lien is necessarily a communication that relates to health. The provision of medical services by a health care professional constitutes a matter of public concern.").

236. Cavin v. Abbott, 545 S.W.3d 47, 49–50 (Tex. App.—Austin 2017, no pet.) ("Among our holdings, we are compelled to conclude that the TCPA's protections extend to—and, ultimately, require dismissal of claims complaining of—statements by the bride's parents that their daughter's suitor won her hand through use of 'Marxist' brainwashing, hypnotic implantation of phobias and false memories, or similar mind-control tactics.").

Several of the eleven subjects listed in the old law contained at least an *implied* requirement that a communication regarding them be of interest to the larger community, including “environmental or economic well-being;” “the government;” and a “*public* official or *public* figure.”<sup>237</sup> For example, the words “environmental or economic” could connote something larger than narrow private interest. “Government” usually refers to something of interest to the greater public. Public officials and public figures may, by use of the word “public,” arguably be tied to something broader<sup>238</sup> than narrow private interest.

On the other hand, under the prior language, the TCPA might have been applied to the communications of an individual concerned only with her own economic well-being or an environmental hazard affecting only the well-being of her isolated rural dwelling. Or, the old TCPA may have applied to a communication targeting a person who was technically a public official but only addressed his actions as a private person, as in *Foster*.<sup>239</sup> These types of hypotheticals under the old definition of “matter of public concern” show the opportunities for creative advocacy the prior definition presented and why the Legislature changed its approach. The new definition will not deprive advocates of opportunities to attempt to plead their clients’ disputes into the TCPA’s coverage, but the Legislature’s clear intent is to focus the statute on public—not private—interests.

Two provisions in the prior definition contained language making the public interest element an express requirement. The old law’s category for “*community* well-being” indicated it applied beyond private interests, although the Texas Supreme Court applied the provision even to a small residential subdivision’s concerns with “malfeasance and criminality by the developer and the [Homeowners Association].”<sup>240</sup>

Similarly, the old definition covered communications about a “good, product, or service *in the marketplace*.”<sup>241</sup> In a late 2019 TCPA opinion, the court held the phrase “in the marketplace,” under the old definition,

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237. Compare Act of June 17, 2011, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961 (amended 2019) (emphasis added) (listing factors implicitly requiring communal interest), *with* CIV. PRAC. & REM. § 27.001(7) (containing explicit language requiring communal interest).

238. *Cavin*, 545 S.W.3d at 61 n.48 (noting the dictionary definition of the term “public” refers to the community when it is used as an adjective).

239. *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 817 (Tex. 1976).

240. *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 896 (Tex. 2018).

241. Act of June 17, 2011, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961 (amended 2019) (emphasis added).

indicated something broader than limited private interests must be present to invoke that component of the former definition.<sup>242</sup> Based on the facts in *Creative Oil & Gas*,<sup>243</sup> the court held, while the dispute arguably involved a product, the dispute was limited to communications to a third party regarding a single oil and gas lease with limited production, much like the approach taken by the U.S. Supreme Court in *Dun & Bradstreet* as discussed in *Snyder*. As the Texas Supreme Court noted, “The ‘in the marketplace’ modifier suggests that the communication about goods or services must have some relevance to a wider audience of potential buyers or sellers in the marketplace, as opposed to communications of relevance only to the parties to a particular transaction.”<sup>244</sup>

While some may argue the new definition of “matter of public concern” is vague or ambiguous, the new language may focus more clearly on communications involving public interest and should be easier to apply than the prior law. Unlike the old law, the new definition of “matter of public concern” precludes its application to narrow private interests, relying internally as it does on such words as “public,” “community,” and “substantial public attention.”<sup>245</sup> At the risk of being criticized for appearing circular, redundant, and ambiguous, the Legislature carefully chose unmistakable language from mainstream jurisprudence to emphasize that, going forward, it is the “public” interest in a communication that will drive the applicability of the TCPA.

242. *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 135 (Tex. 2019).

243. *Id.* at 136; *cf. Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (“[R]estricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest[.]” (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985))).

244. *Creative Oil & Gas*, 591 S.W.3d at 134; *see Erdner v. Highland Park Emergency Ctr., LLC*, 580 S.W.3d 269, 277 (Tex. App.—Dallas 2019, pet. denied) (“Construing the statute to denote that all private business discussions are a ‘matter of public concern’ if the business offers a good, service, or product in the marketplace or is related to health or safety is a potentially absurd result that was not contemplated by the Legislature.”). This opinion was published May 22, 2019, which was one day after House Bill 2730—containing the new definition of public concern—was sent to the governor. However, the case was still subject to the old law. *See Garrison Inv. Grp. LP v. Lloyd Jones Capital, LLC*, No. 02-19-00115-CV, 2019 WL 5996979, at \*5 (Tex. App.—Fort Worth Nov. 14, 2019, no pet.) (mem. op.) (holding the TCPA was inapplicable to a business dispute involving an apartment complex with a federally-insured mortgage because the parties’ negotiations and transactions did not qualify as a matter of public concern but related only to a private dispute having nothing to do with the character or status of the facility or its mortgage insurance).

245. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7)(A)–(C) (codifying current reliance on “substantial public attention”) *with* Act of June 17, 2011, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961 (amended 2019) (omitting the phrase “substantial public attention”).

Still, courts will determine the full sweep of the new law. For example, under the old law, a small subdivision was treated as a “community” with little or no discussion of what the word “community” encompassed, while a small number of participants in a potential transaction regarding a product was insufficient to invoke the “in the marketplace” component of the definition.<sup>246</sup> Standing alone, the Legislature’s use of the phrase “interest to the community” in the new Section 27.001(7)(B) tells us no more than the old law about the nature of a community that will be needed to invoke that part of the new definition going forward. It is conceivable the courts will apply the new language inclusively, as the Texas Supreme Court did by using the “community well-being” phrase of the old law, meaning a community need not be very large to bring it within that aspect of the statute’s public concern ambit. Or, courts may follow a more limiting approach, as the court did in *Creative Oil & Gas*, to find a limited number of private participants involved in a narrowly broadcast communication does not raise the kind of public interest concerns given heightened constitutional protection.<sup>247</sup>

Lawyers appreciated the fact that eight years of precedent under the prior law had provided guidance regarding how the courts should apply the phrase “matter of public concern.” But, as demonstrated by this Article and

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246. See *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 896 (Tex. 2018) (holding the concerns of a small residential community “likely concern[ed] the well-being of the community as a whole”); see also *Creative Oil & Gas, LLC*, 591 S.W.3d at 135 (“The words ‘good, product, or service in the marketplace,’ however, do not paradoxically enlarge the concept of ‘matters of public concern’ to include matters of purely private concern.” (quoting CIV. PRAC. & REM. § 27.001(7)(E))).

247. Senator Hughes shared the following colloquy with Senator Jose Menéndez on the Senate Floor:

Senator Menéndez: How would this bill impact neighborhood groups that oppose projects in their area? Would it impact them in any way? Would this bill keep neighborhoods protected and make sure they have a voice of a public concern, such a city project?

Senator Hughes: Senator Menéndez, the bill we hope to pass would protect their right to voice their objection on matters of public concern. No problem.

Senator Menéndez: No problem, and so I’m glad because I’ve had the experience where they have been threatened they’re going to get sued and that they would not be able to come out from under the costs of those lawsuits, so really there was a chilling effect on their voice.

Senator Hughes: That would be a bad result, and the language of this bill solves that problem.

Senator Menéndez: Thank you very much. I appreciate that.

S.J. of Tex., 86th Leg., R.S. 2011, 2025 (2019).

numerous other sources,<sup>248</sup> there is even more robust, not to mention constitutionally sound, precedent guiding the application of the new public concern definition because it is actually grounded in constitutional law.<sup>249</sup>

It should also be noted some issues presented by the old definition, which lacked a causal link to matters of public concern under the old law, are addressed as exemptions to the application of the TCPA in the new law.<sup>250</sup> Thus, at least some of the difficulties of applying the new public concern definition are negated by the new law's other definitional changes and exemptions. Those exceptions are discussed in Parts V and VI of this Article.

In summary, the Legislature reached three goals in refining the definition of "matter of public concern": (1) it chose specific language that adopted constitutional speech categories regarding those in the public eye and *Snyder's* formula for determining the meaning of public concern;<sup>251</sup> (2) it brought the revised chapter into harmony with its stated and unchanged purpose;<sup>252</sup> and (3) it provided accompanying analytical tools for implementing those categories,<sup>253</sup> with which Texas courts are demonstrably familiar.<sup>254</sup> In applying the language of the new definition, Texas courts can interpret the chapter by following established law and repeatedly using terms that auger against applications to narrow private interests. Applying the concept of public concern in the TCPA context may remain somewhat difficult for courts and litigants, but that result merely demonstrates preserving broad anti-SLAPP protections for the exercise of constitutional rights is a legislative priority.

***Other sources for "public concern":*** One virtue of the Legislature's new definition of "matter of public concern" is the concept, no matter how

248. See R. George Wright, *Speech on Matters of Public Interest and Concern*, 37 DEPAUL L. REV. 27, 27 (1987) (providing guidance on the distinction between public and private concerns). See generally John E. Rumel, *Public Employee Speech: Answering the Unanswered and Related Questions in Lane v. Franks*, 34 HOFSTRA LAB. & EMP. L.J. 243 (2017) (discussing the importance of *Lane v. Franks* as precedent for analyzing matters of public concern).

249. See Wright, *supra* note 248, at 27 (shedding light on the concern with judicial definitions of "public concern").

250. Act of June 17, 2011, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961 (amended 2019).

251. Calvert, *supra* note 153, at 44.

252. TEX. GOV'T CODE ANN. § 311.021(2) ("In enacting a statute, it is presumed that: . . . (2) the entire statute is intended to be effective[.]").

253. *Id.* § 311.021(4) ("In enacting a statute, it is presumed that: . . . (4) a result feasible of execution is intended[.]").

254. *Brady v. Klentzman*, 515 S.W.3d 878, 884 (Tex. 2017).

amorphous, is not new. Indeed, there are so many potential sources available for fleshing out the new language that a substantial listing—let alone a comprehensive one—is well beyond the scope of this Article. The authors suggest several lines of inquiry that may prove useful in identifying cases that have held matters of public concern were at issue and others in which matters of public concern were not involved. The policy and procedural analyses that went into those decisions may help parties and courts apply the concept to a given set of facts.

First, the leading First Amendment cases of the modern era, even prior to *New York Times Co. v. Sullivan*,<sup>255</sup> have addressed the public concern concept in many factual contexts, resulting in frequent discussion by commentators regarding the application and effects of the concept.

Justice Frank Murphy was perhaps the first Supreme Court Justice to articulate the concept that the First Amendment afforded greater protection to matters of public interest. In *Thornhill v. Alabama*,<sup>256</sup> Justice Murphy wrote that “The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment . . . [.]”<sup>257</sup>

*Thornhill* was a challenge to Alabama’s criminal statute prohibiting the picketing of a business, in which the Court said: “[L]abor relations are not matters of mere local or private concern. Free discussion concerning industry conditions and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.”<sup>258</sup> Of course, *Thornhill* was not the oldest First Amendment case, but it clearly articulated the functional importance of free speech, connecting it to the needs of self-government and distinguishing local or private concerns from public concerns.

Since *Thornhill*, the public concern concept has been at the forefront of U.S. Constitutional jurisprudence “*primarily* in two categories of free-speech

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255. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

256. *Thornhill v. Alabama*, 310 U.S. 88 (1940).

257. *Matters of Public Concern*, NATIONWIDE CONSUMER RTS., <https://www.nationwideconsumerrights.com/matters-of-public-concern.html> [<https://perma.cc/2FLX-CZBY>].

258. *Thornhill*, 310 U.S. at 103.

cases: those involving speech by government employees and those involving defamation<sup>259</sup> and other cases sounding in tort.<sup>260</sup>

Those researching public concern cases will note the concept has played a central role in First Amendment jurisprudence. The Texas Supreme Court's opinion in *Klentszman*, discussed above, contains an explanation of the concept and a partial listing<sup>261</sup> of cases. The court based its decision on *Philadelphia Newspapers v. Hepps*<sup>262</sup> and *Gertz v. Welch*,<sup>263</sup> two leading U.S. Supreme Court cases involving individuals suing media defendants for libel over statements regarding matters of public concern. In these types of cases, advocates will find examples of courts finding—or not finding—that matters of public concern were involved.

Second, the Texas libel statute provides a privilege against allegations of libel and has protected discussion of certain “matters of public concern” since 1901 without statutorily defining the term.<sup>264</sup> While the statute applies narrowly to publications by a “newspaper or other periodical,”<sup>265</sup> decisions regarding its applicability may be useful for current or future litigation. For example, the Texas Supreme Court held in *Fitzjarrald v. Panhandle Publishing Co.*<sup>266</sup> that “character and fitness to hold the office are matters of general public concern.”<sup>267</sup> In *Newton v. The Dallas Morning News*,<sup>268</sup> the court held the newspaper's reporting of a dispute between a city and a homeowner was privileged as “reasonable and fair comment or criticism of the official acts of public officials and of other matters of general public concern published for general information.”<sup>269</sup> In *Swate v. Schiffers*,<sup>270</sup> the court held newspaper coverage of a doctor's extensive history of medical malpractice, disciplinary actions by the Texas Medical Board, termination of hospital privileges, and assault were stories about

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259. Ann C. Hodges, *Matters of Public Concern Standard in Free Speech Cases*, in *ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES* 982 (Paul Finkelman ed., Routledge 2006) (emphasis added).

260. See *Snyder v. Phelps*, 562 U.S. 443 (2011), and *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), for cases involving claims of intentional infliction of emotional distress.

261. *Brady v. Klentszman*, 515 S.W.3d 878, 884 (Tex. 2016).

262. *Phila. Newspapers v. Hepps*, 475 U.S. 767, 776 (1986).

263. *Gertz v. Welch*, 418 U.S. 323, 349–50 (1974).

264. See TEX. CIV. PRAC. & REM. CODE ANN. § 73.002(a), (b)(1)(D), (2) (originating in 1901).

265. *Id.*

266. *Fitzjarrald v. Panhandle Publ'g Co.*, 228 S.W.2d 499 (Tex. 1950).

267. *Id.* at 503.

268. *Newton v. Dall. Morning News*, 376 S.W.2d 396 (Tex. App.—Dallas 1964, no writ).

269. *Id.* at 400.

270. *Swate v. Schiffers*, 975 S.W.2d 70 (Tex. App.—San Antonio 1998, pet. denied).

“medical care for members of the public.”<sup>271</sup> Thus, it constituted a matter of public concern under the statute.<sup>272</sup>

A note of caution to courts and advocates: the prior definition of “matter of public concern” used, for example, a single word—“health”—to describe a topic that constituted a public concern, which led courts to construe the statute such that the public element in public concern was essentially eliminated.<sup>273</sup> That is not the same manner in which the courts construed the Texas libel privilege statute’s reference to matters of public concern.<sup>274</sup> For example, in *Swate*, the doctor’s activities were described using terms more like those commanded by *Snyder* and *Connick*.<sup>275</sup> The doctor’s behavior occurred over many years; public agencies were involved in attempting to stop his malpractice,<sup>276</sup> and he broadcasted his services over a clandestine radio station located in Mexico. Thus, the “content, form, and context” of the subject underlying the communications at issue in that case implicated issues far exceeding the doctor’s or any patient’s private interests. The prior TCPA’s conflation of these broader analyses into a single word resulted in its excessive application. Courts and advocates should be aware that the new law is intended to avoid such conflation.

Third, the anti-SLAPP laws of other states are possible sources for illuminating factual circumstances that may or may not amount to matters of public concern, especially those whose applicability is expressly tied to state and federal constitutional rights.<sup>277</sup> The Public Participation Project maintains a chart<sup>278</sup> that provides a good starting place for researching state

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271. *Id.* at 77.

272. *Id.*

273. *See* Lippincott v. Whisenhunt, 462 S.W.3d 507, 509–10 (Tex. 2015) (per curiam) (holding emails between two healthcare employees, which discussed potential wrongdoings by Whisenhunt, involved matters of public concern because his ability to practice in healthcare affected the public).

274. *See, e.g., Swate*, 975 S.W.2d at 74, 77 (construing the definition broadly to include “medical care”).

275. *Compare id.* at 75, 77 (distinguishing standards for libel actions between public and private plaintiffs), *with Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (distinguishing the importance of public and private speech), *and Connick v. Myers*, 461 U.S. 138, 138 (1983) (establishing different treatment for speech made by private citizens on matters of public concern versus speech made by public employees concerning private grievances).

276. *See Swate*, 975 S.W.2d at 74–75, 78 (describing the “negative media attention” focused on *Swate* for a decade).

277. *See State Anti-SLAPP Laws*, *supra* note 28 (providing a graphic summarizing each state’s anti-SLAPP law).

278. *Id.*



anti-SLAPP laws and other helpful legal resources.<sup>279</sup>

#### V. EXEMPTIONS FROM THE TCPA: RETAINED AND NEW

The 2019 legislation retained the four unchanged exemptions of the prior law while its amendments added a laundry list of fifteen new exemptions from the statute. Going forward, nineteen types of cases will not be subject to a motion to dismiss under the revised TCPA.

##### A. *Exemptions Retained from the Old Law*

- Enforcement actions “brought in the name of [the] state or a political subdivision of [the] state by the attorney general, a district attorney, a criminal district attorney, or a county attorney;”<sup>280</sup>
- “[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;”<sup>281</sup>
- “[A] legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action;”<sup>282</sup>
- “[A] legal action brought under the Insurance Code or arising out of an insurance contract.”<sup>283</sup>

The commercial speech and personal injury exemptions in the original TCPA, enacted in 2011, were included at the request of the Texas Trial Lawyers Association (TTLA).<sup>284</sup> The reference in the commercial speech exception to “insurance services” and the Insurance Code exemption were

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279. *Legal Resources*, PUB. PARTICIPATION PROJECT: FIGHTING FOR FREE SPEECH, <https://anti-slapp.org/legal-resources> [<https://perma.cc/8AUM-WGUP>].

280. Formerly, TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(a), now *id.* § 27.010(a)(1).

281. Formerly, *id.* § 27.010(b), now, *id.* § 27.010(a)(2), referred to as the “commercial speech exemption.”

282. Formerly, *id.* § 27.010(c), now, *id.* § 27.010(a)(3).

283. Formerly, *id.* § 27.010(d), now, *id.* § 27.010(a)(4).

284. Act of June 17, 2011, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961 (amended 2019).

added in 2013, again by the request of TILA.<sup>285</sup> During discussion of the 2019 amendments, TILA sought and obtained agreement from the stakeholders and legislators not to disturb the amendments it had requested in the past.

B. *Exemptions Added by the New Law*

- “[A] legal action “arising from an officer-director, employee-employer, or independent contractor relationship that:
  - (A) [S]eeks recovery for misappropriation of:
    - [- T]rade secrets;<sup>286</sup> or
    - [- C]orporate opportunities.<sup>287</sup>
  - (B) [S]eeks to enforce a:
    - [- N]on-disparagement agreement;<sup>288</sup> or
    - [- A] covenant not to compete.”<sup>289</sup>

These exemptions were added at the request of the general business community through the Texas Civil Justice League (TCJL) and Texans for Lawsuit Reform (TLR). Note that these exemptions will only apply to suits in which the parties are in one of the specified relationships with each other. In the cases not described by the exemption, the TCPA may apply depending on whether the communication at issue is covered by the exercise of one of the rights to which the provisions authorizing a motion to dismiss apply.

- “[A] legal action filed under Title 1, 2, 4, or 5, Family Code, or an application for a protective order under Chapter 7A, Code of Criminal Procedure.”<sup>290</sup>

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285. Act of June 14, 2013, 83d Leg., R.S., ch. 1042, § 3, 2013 Tex. Gen. Laws 2499 (amended 2019). Steve Bresnen represented TILA in a lobbying capacity during both the 2011 and 2013 legislative sessions.

286. CIV. PRAC. & REM. § 27.010(a)(5)(A).

287. *Id.*

288. *Id.* § 27.010(a)(5)(B).

289. *Id.*

290. *Id.* § 27.010(a)(6).

The suits to which this exemption applies include marital relationships, name changes, dating and family violence protective orders, and those affecting the parent-child relationship (“SAPCRs”).<sup>291</sup> In addition, the exemption covers *applications* for protective orders involving certain sexual and assaultive offenses under the Penal Code.<sup>292</sup> By exempting family law from the TCPA, the state legislature recognized the significant harm to one or more parties that may be caused in cases where a TCPA motion to dismiss results in inevitable delays.<sup>293</sup> For example, the stay required by the TCPA following a motion to dismiss filed shortly after the filing of a SAPCR could prevent the court from issuing even temporary orders governing a child’s living circumstances, child support, and the operation of a family-owned business until the motion is resolved, which could involve years of appeals.<sup>294</sup> Barring action on a protective order application could expose a victim of sexual assault to further victimization by a perpetrator pending resolution of the motion to dismiss.<sup>295</sup>

The Texas Family Law Foundation, a statewide nonprofit organization of approximately 800 lawyers whose practices focus almost entirely on family law, sought the family law exemption.<sup>296</sup>

- “[A] legal action brought under Chapter 17, Business & Commerce Code, other than an action governed by Section 17.49(a) of that chapter.”<sup>297</sup>

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291. *Id.*

292. TEX. CODE CRIM. PROC. ANN. § 7A authorizes protective order applications by adult victims (or a parent or guardian acting behalf of a child victim) related to violations of Penal Code §§ 20A.02 (trafficking of persons); 20A.03 (continuous trafficking of persons); 21.02 (continuous child sexual abuse); 21.11 (indecent with a child); 22.011 (sexual assault); 22.012 (indecent assault); 22.021 (aggravated sexual assault); 42.072 (stalking); and 43.05 (compelling prostitution).

293. *See, e.g.*, H.B. 2730 Briefing Doc., *supra* note 49, at 2–4 (describing problems associated with Texas’s anti-SLAPP statute in detail).

294. *See* CIV. PRAC. & REM. § 27.003(b), (c) (addressing motions to dismiss under this chapter); *see generally* Emily Miskel, *Anti-SLAPP Dismissals: The Monster That Could Eat Your Case*, in STATE BAR OF TEXAS, 45TH ANNUAL ADVANCED FAMILY LAW COURSE 3–5 (2019) (discussing the TCPA amendments of HB 2370 and procedures associated with TCPA motions to dismiss).

295. *See Barlow v. Dinaali*, No. E061915, 2016 WL 2893061, at \*2 (Cal. Ct. App. May 13, 2016) (holding trial court did not err by not considering defendant’s anti-SLAPP motion filed in opposition of a request for a restraining order).

296. TEX. FAM. L. FOUND., <https://www.texasfamilylawfoundation.com/> [<https://perma.cc/J88G-VRQT>].

297. CIV. PRAC. & REM. § 27.010(a)(7).

Chapter 17 addresses a diverse variety of specific deceptive trade practices, including private use of the state seal,<sup>298</sup> bogus going-out-of-business sales,<sup>299</sup> misusing certain containers<sup>300</sup> and deceptive advertising.<sup>301</sup> At the heart of the chapter lies the Deceptive Trade Practices—Consumer Protection Act<sup>302</sup>—which provides a laundry list describing general principles and specific practices that are actionable under that subchapter. In many of the listed deceptive trade practices, communication is a central element of the unlawful act, such as, “*representing* that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.”<sup>303</sup>

Note that because of its reference to Section 17.49(a), Business and Commerce Code, this exemption does not apply to suits against certain media owners or employees involving advertising carried by them unless the actor had knowledge that the advertising was deceptive or had a substantial financial interest in the underlying good or service being advertised.<sup>304</sup> Note also that there will likely be overlap between the commercial speech exemption retained from the old law and the new exemption.

TTLA and the business community supported the exemption of Chapter 17, Business and Commerce Code (with the exception of Section 17.49(a)) from coverage under Chapter 27.<sup>305</sup>

- “[A] legal action in which a moving party raises a defense pursuant to Section 160.010, Occupations Code, Section 161.033, Health and Safety Code, or the Health Care Quality Improvement Act of 1986 (42 U.S.C. 11101 et seq).”<sup>306</sup>

Each of the cited laws in this exemption relate to health care

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298. TEX. BUS. & COM. CODE ANN. § 17.08.

299. *Id.* § 17.11(c); *see id.* §§ 17.81–93 (defining “going out of business sale”).

300. *Id.* § 17.29.

301. *Id.* § 17.12.

302. *Id.* §§ 17.41–63.

303. *Id.* § 17.46(b)(7) (emphasis added).

304. *See id.* § 17.49(a) (discussing exemptions as they apply to the Deceptive Trade Practices and Consumer Protection subchapter).

305. Amy and Steve Bresnen represented TTLA during the 2019 legislative session; *see also* *Bumjin Park v. Suk Baldwin Props., LLC*, No. 03-18-00025-CV, 2018 WL 4905717, at \*1–6 (Tex. App.—Austin Oct. 10, 2018, no pet.) (mem. op.) (applying the TCPA to a DTPA case).

306. TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(a)(8).

professionals' immunity from liability regarding peer review and review by medical committees of care in health care facilities.<sup>307</sup>

The Texas Medical Association and other healthcare-related trade associations requested this exemption.

- “[A]n eviction suit brought under Chapter 24, Property Code.”<sup>308</sup>

The Texas Apartment Association, speaking independently, and through the TCJL,<sup>309</sup> sought this exemption so that suits for eviction, intended to allow prompt removal of delinquent tenants, would not be delayed by the tenant filing a TCPA motion to dismiss, potentially allowing the tenant to stay put, perhaps for years.

- “[A] disciplinary action or disciplinary proceeding brought under Chapter 81, Government Code, or the Texas Rules of Disciplinary Procedure.”<sup>310</sup>

The State Bar of Texas sought the exemption after enforcing its disciplinary rules against an attorney in district court in which the attorney subsequently filed a TCPA motion to dismiss.<sup>311</sup> While the courts held the TCPA applied to the case, they also held the Bar had met its burden to show a *prima facie* case so that the suit could go forward.<sup>312</sup> Still, the case was

307. See H.B. 2730 Briefing Doc., *supra* note 49, at 6 (“Suits responding to medical peer reviews will be excepted from the [Texas anti-SLAPP] statute.”); see also *Mem'l Hermann Health Sys. v. Khalil*, No. 01-16-00512-CV, 2017 WL 3389645, at \*9–12 (Tex. App.—Houston [1st Dist.] Aug. 8, 2017, pet. denied) (mem. op.) (“[A] ‘health care entity that, without malice, participates in medical peer review or furnishes records, information, or assistance to a medical peer review committee or the board is immune from any civil liability arising from that act.’” (quoting TEX. OCC. CODE § 160.010(c)); *Batra v. Covenant Health Sys.*, 562 S.W.3d 696, 715 (Tex. App.—Amarillo 2018, pet. denied) (“[A] cause of action does not accrue against a member, agent, or employee of a medical peer review committee or against a health care entity from any act, statement, determination or recommendation made or act reported, without malice, in the course of medical peer review.”).

308. CIV. PRAC. & REM. § 27.010(a)(9).

309. See H.B. 2730 Briefing Doc., *supra* note 49, at 1 (listing supporters of the “anti-SLAPP” bill such as the Texas Apartment Association).

310. CIV. PRAC. & REM. § 27.010(a)(10).

311. See *generally* *Comm’n for Lawyer Discipline v. Rosales*, 577 S.W.3d 305 (Tex. App.—Austin 2019, pet. denied) (holding “lawyer-discipline actions are not exempt from applicability of Texas Citizens Participation Act (TCPA)”).

312. See *id.* at 315–16 (analyzing whether “the district court erred in granting the TCPA motion to dismiss because the Commission met its burden of ‘establish[ing] by clear and specific evidence a

delayed for months while this result was being reached.<sup>313</sup>

- “[A] legal action brought under Chapter 554, Government Code.”<sup>314</sup>

Chapter 554 protects government employees who report a government’s violation of the law (i.e., whistleblowers) by authorizing them to bring a civil lawsuit if the employer retaliates by taking an adverse employment action against the employee in retaliation.<sup>315</sup> A TCPA motion to dismiss will no longer impede the employee’s cause of action. The Legislature added the exemption for whistleblowers after hearing testimony during the House Committee hearing on House Bill 2730.<sup>316</sup>

- “[A] legal action based on a common law fraud claim.”<sup>317</sup>

To prove common law fraud, the plaintiff must prove the defendant made a material misrepresentation and the plaintiff relied on the misrepresentation,<sup>318</sup> meaning a communication was made involving a transaction between two parties. Under the prior definition of “matter of public concern,” neither an allegation of material misrepresentation nor reliance were required for the old TCPA to apply; the communication only had to involve “an issue *related to* a good, product or service in the marketplace.”<sup>319</sup> The commercial speech exemption (unchanged by H.B. 2730) was not limited to cases alleging material misrepresentation or

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prima facie case for each essential element of the claim in question.” (quoting CIV. PRAC. & REM. § 27.005(c)) (alteration in original).

313. See generally *Comm’n for Lawyer Discipline*, 577 S.W.3d at 305 (establishing delay experienced by the court while reaching its decision).

314. CIV. PRAC. & REM. § 27.010(a)(11).

315. See TEX. GOV’T CODE ANN. § 554.008 (“A supervisor who in violation of this chapter suspends or terminates the employment of a public employee or takes an adverse personnel action against the employee is liable for a civil penalty not to exceed \$15,000.”).

316. Tex. H.B. 2730 Before the House Comm. on Judiciary & Civil Jurisprudence, 86th Leg., R.S. GRANICUS (Apr. 1, 2019), [https://tlchouse.granicus.com/MediaPlayer.php?view\\_id=44&clip\\_id=16843](https://tlchouse.granicus.com/MediaPlayer.php?view_id=44&clip_id=16843).

317. CIV. PRAC. & REM. § 27.010(a)(12).

318. See *Zorilla v. Aypco Constr. II, LLC*, 469 S.W. 3d 143, 153 (Tex. 2015) (defining a “common-law fraud claim”); see also *Better Bus. Bureau of Metro. Hous., Inc. v. John Moore Servs., Inc.*, 441 S.W.3d 345, 358 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (listing elements which deem a person committed fraud).

319. CIV. PRAC. & REM. § 27.001(7)(E) (expired Aug. 31, 2019) (emphasis added).

reliance.<sup>320</sup> The broadly-stated exemption limited the broadly-stated definition.<sup>321</sup> Under the new definition, it is clear there will be no TCPA protection for cases of common law fraud and cases alleging other theories of liability involving transactions in goods, products, and services will continue to be covered by the statute's commercial speech exemption.<sup>322</sup>

## VI. PROTECTIONS FOR THE MEDIA, ASSAULT VICTIMS AND OTHERS

Having reached an agreement to carve an *additional* eleven types of cases from the TCPA's coverage, as well as barring governmental entities from utilizing its motion to dismiss, the Legislature recognized those exemptions might also sweep too broadly.<sup>323</sup> It used exceptions to the exemptions to reinstate coverage of the TCPA to selected types of cases.<sup>324</sup> California had used the same technique when—following abuses of its original law—it reformed its “anti-SLAPP statute” by describing cases to which the statute would not apply and then enacting exceptions to those exceptions,<sup>325</sup> including for the media, an all-important industry in that state.

### A. *The Media Provision*<sup>326</sup>

Since at least *New York Times v. Sullivan*, First Amendment jurisprudence has recognized the media's unique role in society. The Texas Legislature has substantially immunized some of the media by statutorily defining “libel” and providing privileges, defenses to liability, procedures to mitigate

320. *See id.* 27.010(a)(2) (detailing the commercial speech exemption).

321. *Id.*

322. *See id.* § 27.010(a)(12) (stating “this chapter does not apply to . . . a legal action based on a common law fraud claim”); *id.* § 27.010(a)(2).

323. *See id.* § 27.010(a)(1)–(12) (showing additional types of cases that do not apply this chapter).

324. *See generally id.* § 27.010(a)–(b) (showing the current exemptions of this chapter effective Sept. 1, 2019).

325. CAL. CIV. PROC. CODE § 425.17 (West 2012). Subsection 425.17(a) provides:

The Legislature finds and declares that there has been a disturbing abuse of Section 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16. 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 or Section 425.16.

326. *See generally* CIV. PRAC. & REM. § 27.010(b)(1) (“[D]ramatic, literary, musical, political, journalistic, or otherwise artistic work, including audio-visual work regardless of the means of distribution, a motion picture, a television or radio program, or an article published in a newspaper, website, magazine, or other platform, no matter the method or extent of distribution[.]”).

liability,<sup>327</sup> and interlocutory appeals in certain cases.<sup>328</sup> The new anti-SLAPP law provides yet another method of recognizing the media's unique function.

By contrast with every other state's "anti-SLAPP statute"—including California<sup>329</sup>—the new Texas law provides far broader protections for the media.<sup>330</sup> The very function of a media entity involves either preparing to speak, speaking, or conveying the speech of others to the public, making those entities uniquely exposed to litigation in response to their activities.

As an express exception to three of the exemptions, the media provision may be somewhat confusing, requiring careful study by courts and advocates going forward.<sup>331</sup>

Comprised of a single sentence containing 146 words, 32 commas, 1 colon, and 1 semi-colon, it may be helpful to break the provision down into its critical parts:

1. The provision applies to "a legal action against a person arising from any act of that person" described in the provision.<sup>332</sup> The word "person" includes individuals and any type of legal entity.<sup>333</sup> The language covers the individual who writes a screenplay, as well as the companies that produce and distribute the film made from the writer's work.
2. The TCPA *will continue to apply* notwithstanding three expressed exceptions because the conduct described by each exemption involves communications frequently conveyed by or through a media

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327. *See generally id.* §§ 73.001–.006 (offering guidance on the Texas Legislature's definition and understanding of "libel").

328. *See id.* § 51.014(a)(12) ("A person may appeal from an interlocutory order of a district court, county court at law, statutory probate court, or county court that denies a motion to dismiss filed under Section 27.003.").

329. CAL. CIV. PROC. § 425.17 (d).

330. *See Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT: FIGHTING FOR FREE SPEECH, <https://anti-slapp.org> (hover over the "Our Work" link; click the "State Anti-SLAPP Laws" link; click the "State Anti-SLAPP Reference Chart" link) [<https://perma.cc/M8JF-P73T>] (providing a state anti-SLAPP Reference Chart).

331. *See* CIV. PRAC. & REM. § 27.010(b).

332. *Id.* § 27.010(b)(1).

333. *See* TEX. GOV'T CODE ANN. § 311.005(2) ("'Person' includes corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity.").



entity.<sup>334</sup> Specifically, the TCPA will apply to a suit against a media defendant based on communication covered by the:

- A. commercial speech exemption;<sup>335</sup>
  - B. deceptive trade practices exemption;<sup>336</sup> and
  - C. fraud exemption.<sup>337</sup>
3. The media provision applies to both public and private acts of the media defendant.<sup>338</sup>
  4. The provision applies to acts “*related to the gathering, receiving, posting, or processing of information for communication to the public . . .*”<sup>339</sup> Even activities that *precede* any communication, such as gathering and receiving information in preparation for communication, are covered by the provision.<sup>340</sup> For example, claims of invasion of privacy by a news organization’s investigation of a story would be covered by the provision.
  5. The provision applies even though *no information* is actually communicated to the public and regardless of “the method or extent of distribution.”<sup>341</sup>
  6. The provision applies to the “creation, dissemination, exhibition, or advertisement or other similar promotion of” the communication at issue.<sup>342</sup> Again, creating a story would precede its exhibition, as would pre-publication promotion of the story. However, both

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334. CIV. PRAC. & REM. § 27.010(b)(1).

335. *Id.* § 27.010(a)(2).

336. *Id.* § 27.010(a)(7).

337. *Id.* § 27.010(a)(12).

338. *See id.* § 27.010(b)(1) (“[T]his chapter applies to a legal action . . . against a person arising from any act of that person, whether public or private . . .”).

339. *Id.* § 27.010(b)(1) (emphasis added).

340. *Id.*; *see* Tamkin v. CBS Broad., Inc., 122 Cal. Rptr. 3d 264, 273 (Cal. Ct. App. 2011) (“[E]ach time the defamatory statement is communicated to a third person who understands its defamatory meaning as applied to the plaintiff, the statement is said to have been ‘published,’ although a written dissemination, as suggested by the common meaning of that term, is not required.”).

341. CIV. PRAC. & REM. § 27.010(b)(1) (emphasis added). *But see* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 752–53 (1985) (recognizing the limited extent of distribution of the information at issue led the Vermont Supreme Court to hold a constitutionally protected matter of public concern was not present).

342. CIV. PRAC. & REM. § 27.010(b)(1).

activities would likewise be covered by the provision, as well as advertising the story after its publication.

7. The covered activities must be performed in relation to a “dramatic, literary, musical, political, journalistic, or otherwise artistic work, including audio-visual work regardless of the means of distribution, a motion picture, a television or radio program, or an article published in a newspaper, website, magazine, or other platform, no matter the method . . . of distribution[.]”<sup>343</sup>

This all-inclusive language has two components: (a) the kinds of works covered by the provision and (b) a non-exclusive list of various mediums by which a communication may be conveyed. There will undoubtedly be cases in which advocates assert a particular work (e.g., subject matter that constitutes pornography or the Internet blog of a person interested in football) is not described by the words “dramatic, literary, musical, political, journalistic, or otherwise artistic work . . . .”<sup>344</sup> But, the language should substantially reduce or eliminate disputes regarding whether a particular type of *medium* used for communicating is covered by the provision.

A number of exemptions, however, are not undone by the media provision. For example, based on the family law exception, screenwriters cannot avail themselves of the TCPA in divorce proceedings merely because they work for a media organization.<sup>345</sup> If a journalist racing to the scene of a newsworthy event runs over a pedestrian, the resulting personal injury suit against the driver and the news outlet that employs the journalist will not be subject to the TCPA.<sup>346</sup> An insurance company cannot invoke the TCPA in a suit by a Broadway producer against the company that wrote the business interruption insurance for a play canceled due to an insured cause.<sup>347</sup> And, a media company whose ideas for a new film were misappropriated by a former employee will not see its suit against the

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343. *Id.*

344. *Id.*

345. *See id.* § 27.010(a)(6) (“This chapter does not apply to . . . a legal action filed under Title 1, 2, 4, or 5, Family Code, or . . . Code of Criminal Procedure[.]”).

346. *See id.* § 27.010(a)(3) (“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[.]”).

347. *See id.* § 27.010(a)(4) (“This chapter does not apply to . . . a legal action brought under the Insurance Code or arising out of an insurance contract[.]”).

employee subjected to a TCPA motion to dismiss.<sup>348</sup>

Just as the new TCPA's treatment of public concern emphasizes the public element, the boundaries between when the media provision will and will not apply represent the Legislature's recognition of the media *as media* versus private individuals and business entities in non-media roles. In its unique role, the media will receive the benefit of the TCPA's motion to dismiss and related provisions. In its roles as individuals and business entities, media members will be treated as all other persons are treated.

Due to the kind of twist of fate that often makes the legislative process interesting, AT&T's Texas leadership ended up playing a central role in defining the demarcation between the interests of the media as media and the interests of corporate entities irrespective of their status as media entities.<sup>349</sup> House Bill 2730 was filed just two days after AT&T prevailed at the federal Court of Appeals for the D.C. Circuit against the United States Justice Department Antitrust Division's attempt to block the company's proposed merger with Time Warner, one of the world's largest media and entertainment companies, the holdings of which include CNN, HBO and Warner Brothers.<sup>350</sup> Overnight, a "simple" wireless carrier—headquartered in Dallas, one of Texas's largest and most influential employers and a leading member of the Texas Civil Justice League—became a media giant with global reach.<sup>351</sup> Wearing both corporate and media hats put AT&T in a truly unique position.

Public discussion of the Legislature's consideration of major reforms to the TCPA immediately became of critical interest to the company. AT&T's

348. See *id.* § 27.010(a)(5)(A) ("This chapter does not apply to . . . a legal action arising from an officer-director, employee-employer, or independent contractor relationship that seeks recovery for misappropriation of trade secrets or corporate opportunities[.]").

349. See generally House Res. Org., Bill Analysis, Tex. H.B. 2730, 86th Leg., R.S. (2019) (clarifying changes and aspects of revising the TCPA).

350. See Edmund Lee & Cecilia Kang, *U.S. Loses Appeal Seeking to Block AT&T-Time Warner Merger*, N.Y. TIMES (Feb. 26, 2019), <https://www.nytimes.com/2019/02/26/business/media/at-t-time-warner-appeal.html> [<https://perma.cc/V59T-D8ZH>] (reporting "the merger between AT&T and Time Warner has already begun to reshape much of the media industry").

351. See *AT&T Takes Crown from Exxon As Largest Dallas-Area Company in Market Value*, DALL. BUS. J. (Jan. 24, 2020, 1:24 PM), <https://www.bizjournals.com/dallas/news/2020/01/24/at-t-exxon.html> [<https://perma.cc/WC2X-LNFX>] ("The Dallas area may still have a reputation for big oil, but it[']s AT&T taking the title of biggest local company over Exxon by one measure.").

leaders in Austin<sup>352</sup> began to hear from their new media partners from across the country, who were alerted to the issue by their colleagues at the Motion Picture Association of America, the Texas Association of Broadcasters (TAB), and the Texas Press Association (TPA).<sup>353</sup> TAB and TPA “came out swinging” against *any* change to the old TCPA even before House Bill 2730 was filed.<sup>354</sup>

AT&T Texas, deeply engaged in the Texas economy and state politics, recognized the need for change. Its interests as a major employer were affected by issues such as the difficulties of enforcing noncompete agreements and protecting trade secrets, necessitating changes in the old TCPA. Its interests as a newly-minted media company required ensuring protections under the old law remained an effective shield.

Building on the California anti-SLAPP statute’s media provision,<sup>355</sup> the company’s leadership secured the necessary legislative support of the anti-SLAPP protections for the media and effectively neutralized the significant opposition originally presented by TAB and TPA, ultimately bringing them into support of the final bill.<sup>356</sup> Working with other non-media participants in the negotiations, the company helped to construct carefully targeted exemptions from the TCPA applicable to general corporate and legal participants’ interests while preserving the heart of the TCPA: the protection of constitutional rights.

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352. See *Leslie Ward*, AT&T SOUTHWEST, <https://southwestregion.att.com/team/leslie-ward/> [<https://perma.cc/V6D5-T98S>] (“Leslie Ward, the president of AT&T Texas, works closely with community and business leaders, elected officials and others at AT&T to continue bringing the most advanced communications and entertainment technologies and services to Texas communities.”); see also *Mr. Jon David ‘David’ Tate*, ST. B. TEX., [https://www.texasbar.com/AM/Template.cfm?Section=Find\\_A\\_Lawyer&template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=154334](https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=154334) [<https://perma.cc/NJ6A-5GW3>] (providing practice information about Mr. Tate, Vice-President and Associate General Counsel for AT&T).

353. See *Free Speech Advocates Mobilize to Protect Texas Anti-SLAPP Law*, TEX. ASS’N OF BROADCASTERS (Mar. 11, 2019), <https://www.tab.org/news-and-events/news/free-speech-advocates-mobilize-to-protect-texas-anti-slapp-law> [<https://perma.cc/C3T3-9ZKE>] (discussing mobilization of free speech advocates in Texas).

354. *What Are SLAPP Lawsuits and Why Do You Need a Law to Protect You from Them?*, CALLER TIMES (Feb. 15, 2019, 7:00 AM), <https://www.caller.com/story/opinion/2019/02/15/what-slapp-suits-and-why-do-you-need-protection-them/2861484002/> [<https://perma.cc/QKZ7-G7ME>] (“As of this writing, no bill has been filed, but the table has been set. News organizations in Texas, including this one, stand ready to oppose it.”); see *H.B. 2730*, TEX. LEGIS. ONLINE, <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=HB2730> [<https://perma.cc/NP7Q-84Z6>] (reporting H.B. 2730 as filed on February 28, 2019).

355. CAL. CIV. PROC. CODE § 425.17(d) (West 2012).

356. Sen. Comm. Rep., Bill Analysis, Tex. H.B. 2730, 86th Leg., R.S. (2019) (witness list).

### B. *The “Yelp” Provision*

A second aspect of the media exception to three of Chapter 27's exemptions is the so-called “consumer review” provision.<sup>357</sup> This amendment was sought on behalf of Yelp,<sup>358</sup> a regional unit of the Better Business Bureau (BBB), and similar businesses, which opposed the bill as filed. Yelp, specifically, was concerned that certain types of relevant media might not be covered by the proposed amendments to the TCPA.

Yelp hosts online reviews by consumers regarding their opinions of various businesses, goods, and services.<sup>359</sup> The BBB rates businesses based on comments from third parties and used the older TCPA to its advantage.<sup>360</sup> As enacted, the commercial speech, deceptive trade, and fraud exemptions will not apply to suits described by the consumer review provision; i.e., the TCPA *will* apply.<sup>361</sup>

### C. *Protections for Victims of Assault and Other Crimes*

The Texas Council on Family Violence and Texans Against Sexual Assault requested the 2019 legislation add Section 27.010(c).<sup>362</sup> These victims' rights organizations were concerned that perpetrators would sue their victims if the victim spoke publicly or privately about the offenses, and whether the victim initiated or responded to a communication made by the perpetrator.<sup>363</sup>

While positioned in the section of the TCPA labeled “Exemptions,” the TCPA will apply in these cases without regard to *any* exemption. The provision applies to suits *against* victims—or alleged victims—of family or

357. See TEX. CIV. PRAC. & REM. CODE ANN. § 27.010(b)(2) (“[T]his chapter applies to . . . a legal action against a person related to the communication, gathering, receiving, posting, or processing of consumer opinions or commentary, evaluations of consumer complaints, or reviews or ratings of businesses.”).

358. YELP, <https://www.yelp.com/> [<https://perma.cc/7AFD-TNAQ>].

359. See *Duchouquette v. Prestigious Pets, LLC*, No. 05-16-01163-CV, 2017 WL 5109341, at \*1 (Tex. App.—Dallas Nov. 6, 2017, no pet.) (mem. op.) (“[T]he Duchouquettes filed a TCPA motion to dismiss claiming that the Yelp review was an exercise of free speech and requesting attorneys’ fees and sanctions.”).

360. See generally *John Moore Servs. v. Better Bus. Bureau*, No. 01-14-00906-CV, 2016 WL 3162206, at \*1 (Tex. App.—Houston [1st Dist.] June 2, 2016, no pet.) (mem. op.) (“John Moore sued the Bureau alleging that it was harmed by the Bureau’s publication of an unfavorable online review.”).

361. CIV. PRAC. & REM. § 27.010(a)–(b).

362. E-mail from Christopher Kaiser, (Past) Dir. of Public Policy/General Counsel, Texas Association Against Sexual Assault, to Amy Bresnen and Steve Bresnen (Mar. 28, 2019, 4:08 PM) (on file with authors).

363. *Id.*

dating violence<sup>364</sup> or a list of enumerated crimes in the kidnapping, sexual assault, and human trafficking provisions of the Penal Code<sup>365</sup> if the suit is “based on or in response to a . . . communication.” The provision will apply regardless of whether the communication is public or private.<sup>366</sup> For example, if a victim tells a friend in a private discussion that the victim has been abused and the alleged abuser, having learned of the communication, sues the victim for defamation based on it, the victim will be able to rely on the anti-SLAPP statute.

## VII. PROCEDURAL AMENDMENTS

### A. *The Motion to Dismiss: Eligible Filers Under the New TCPA*

The new law struck the phrase “relates to” in order to narrow the definition of “matter of public concern”; the same occurred to narrow the application of Section 27.003, the “motion to dismiss” provision of the TCPA.<sup>367</sup> Many jurists opined about the extraordinary breadth of this phrase, after the Texas Supreme Court rejected the assertion that it required “something more than a tenuous or remote relationship.”<sup>368</sup> Under the new law, a legal action for which the motion to dismiss is eligible must be “based on or in response to” the movant’s exercise of one of the protected

364. See generally TEX. FAM. CODE ANN. §§ 71.001–.007 (offering clarification of the provision and its definitions under Chapter 71).

365. See generally TEX. PENAL CODE ANN. §§ 20.01–.07 (addressing the kidnapping, unlawful restraint and smuggling of persons); see *id.* §§ 20A.01–.04 (covering the trafficking of persons); *id.* §§ 21.01–.19 (discussing sexual offenses); *id.* §§ 22.01–.12 (outlining assaultive offenses).

366. See CIV. PRAC. & REM. § 27.010(c) (“This chapter applies to a legal action against a victim or alleged victim of family violence or dating violence . . . based on or in response to a public or private communication.”).

367. See *Pinkerton Law Firm, PLLC v. Univ. Cancer Ctr., Inc.*, No. 01-19-00089-CV, 2020 WL 97173, at \*3 (Tex. App.—Houston [1st Dist.] Jan. 9, 2020, pet. filed); see also Senate Research Ctr., Bill Analysis, Tex. H.B. 2973, 82d Leg., R.S. (2011) (“Effective date: upon passage or September 1, 2011.”); *cf.* CIV. PRAC. & REM. § 27.003(a) (codifying amendments to the “motion to dismiss” provision of the TCPA).

368. *Grant v. Pivot Tech. Sols., Ltd.*, 556 S.W.3d 865, 880 (Tex. App.—Austin 2018, pet. denied) (“[T]he Texas Supreme Court has rejected the assertion that the plain language of the phrase [relates to], which includes no qualification as to its limits, requires ‘something more than a tenuous or remote relationship.’” (quoting *Cavin v. Abbott*, 545 S.W.3d 47, 63 (Tex. App.—Austin 2017, pet. denied))); see also *Robert B. James, DDS, Inc. v. Elkins*, 553 S.W.3d 596, 604 (Tex. App.—San Antonio 2018, pet. denied) (“Conversely, the Legislature declined to use a broader qualifying phrase like ‘relates to.’ In the insurance contract exemption, the Legislature purposefully used the phrase ‘arising out of and not ‘based on,’ ‘brought under,’ or ‘relates to.’” (quoting *Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm’n*, 518 S.W.3d 318, 325–26 (Tex. 2017))).

rights or “arise[] from” an activity to which the media provision applies.<sup>369</sup> The motion to dismiss provision was also narrowed by prohibiting governmental entities, or an official or public employee acting in an official capacity, from filing such a motion.<sup>370</sup> This change was the result of concern by some stakeholders that a governmental entity could file a TCPA motion to dismiss in an attempt to intentionally and inappropriately sequester information from the public.<sup>371</sup>

B. *Timing, Burdens, and the Effects of Dismissal Under the New TCPA*

**Timing:** Under the old law, a party had sixty days after the date of service to file a TCPA motion to dismiss,<sup>372</sup> unless the court extended the time upon a showing of good cause. The timing for filing the motion was changed to allow the parties, upon mutual agreement, to extend the time to file the motion to dismiss.<sup>373</sup>

Two other new timing requirements were also added. The first requires the movant to give the non-moving party written notice of the date and time of the hearing at least twenty-one days beforehand unless the parties agree or the court orders otherwise.<sup>374</sup> The second requires the nonmovant's response to the motion to be filed at least seven days before the hearing, unless agreed by the parties or a court orders otherwise.<sup>375</sup>

Finally, the old law required a court to decide the motion within thirty days “following the date of the hearing.”<sup>376</sup> The current law more specifically ties the thirty-day timeframe to the date the hearing “concludes,” which takes into account a multi-day hearing.<sup>377</sup> These changes were made

369. CIV. PRAC. & REM. § 27.003(a).

370. *See id.* (“A party under this section does not include a government entity, agency, or an official or employee acting in an official capacity.”).

371. *See generally* Roach v. Ingram, 557 S.W.3d 203, 219, 225 (Tex. App.—Houston [14th Dist.] 2018, pet. denied) (holding the court properly dismissed parents' claims because the defendants satisfied their burden under the TCPA to demonstrate the lawsuit related to the “exercise of the right to free speech concerning communications ‘made in connection with’ . . . the enforcement of truancy laws and the operation of the Truancy Court,” and the “request for declaratory and prospective injunctive relief concerning alleged ultra vires acts and violations of due process [were] moot” (quoting CIV. PRAC. & REM. § 27.003(a))).

372. *In re* Estate of Check, 438 S.W.3d 829, 832 (Tex. App.—San Antonio 2014, no pet.).

373. CIV. PRAC. & REM. § 27.003(b).

374. *Id.* § 27.003(d).

375. *Id.* § 27.003(e).

376. *Id.* § 27.005(a) (expired Aug. 31, 2019).

377. *Id.*

to encourage a prompt process and align more closely with conventional summary-judgment rules.<sup>378</sup>

**Burdens of proof:** Under the old law, the provision for pre-trial dismissal of claims made the statute arguably vulnerable to a constitutional attack<sup>379</sup> because courts were required to apply burdens of proof and affirmative defenses without evidence or juries. The nonmovant's burden to provide "clear and specific" evidence for each essential element of the claim meant a nonmovant was required to set forth a minimum quantum of evidence.<sup>380</sup> Nevertheless, the movant could prevail by establishing each essential element of a valid defense to the nonmovant's claim by a "preponderance of the evidence."<sup>381</sup>

This allocation of burdens was problematic. In most defamation cases, for example, the defendant asserts the affirmative defense of "truth."<sup>382</sup> However, under the old TCPA, the trial court could "consider the pleadings and supporting and opposing affidavits"<sup>383</sup> but could not hear testimony. Coupled with the "preponderance of the evidence" standard, a court would essentially be required to determine whether the defendant was telling the

378. See TEX. R. CIV. P. 166a(c) ("Motion and Proceedings Thereon. The motion for summary judgment shall state the specific grounds therefor. Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response.")

379. See Justin M. Waggoner, *Challenging the TCPA on Grounds that It Violates the Right to Trial by Jury*, 84 ST. B. LITIG. SEC. REP. ADVOC. 54, 54 (2018) ("This article explores the possibility of a constitutional challenge to the TCPA that may present an avenue for defeating particular types of TCPA motions that does not require meeting the statute's potentially burdensome procedural requirements at an early stage of the lawsuit, before discovery is commenced . . ."); see also *Washington Supreme Court Strikes Down Anti-SLAPP Law As Unconstitutional*, REPS. COMMITTEE FOR FREEDOM PRESS (May 28, 2015), <https://www.rcfp.org/washington-supreme-court-strikes-down-anti-slapp-law-unconstitutional/> [<https://perma.cc/JG8J-5Z52>] ("The decision marks the first time an anti-SLAPP law has been held unconstitutional."); see also *Minnesota*, REPS. COMMITTEE FOR FREEDOM PRESS, <https://www.rcfp.org/anti-slapp-guide/minnesota/> [<https://perma.cc/ECZ8-LQ6T>] ("Minnesota adopted anti-SLAPP legislation in 1994. However, in 2016, a state appellate court found the statute unconstitutional . . .").

380. See *In re Lipsky*, 460 S.W.3d 579, 587 (Tex. 2015) (summarizing how some Texas courts required a "heightened evidentiary standard, unaided by inferences").

381. See *Campone v. Kline*, No. 03-16-00854-CV, 2018 WL 3652231, at \*1 (Tex. App.—Austin Aug. 2, 2018, no pet.) (mem. op.) ("If the nonmovant makes such a showing, the trial court will still dismiss the action if the movant 'establishes by a preponderance of the evidence each essential element of a valid defense' to the nonmovant's claim." (quoting CIV. PRAC. & REM. § 27.005(d))).

382. See *id.* at \*5 (summarizing the defendant's motion to dismiss as containing a "truth" defense).

383. Senate Research Ctr., Bill Analysis, Tex. H.B. 2730, 86th Leg., R.S. (2019).



truth based solely on pleadings (not traditionally considered to be “evidence”) and affidavits, replacing the jury’s constitutional fact-finding function.<sup>384</sup> The standards of the old law made it more difficult to survive a pre-discovery motion to dismiss than to survive a post-discovery motion for summary judgment. Doubts as to whether this arrangement violated the “right of trial by jury,”<sup>385</sup> or access to the courts,<sup>386</sup> or simply created an absurd yet constitutionally permissible result were reason enough to amend Section 27.005(d).<sup>387</sup> The prior statute’s breadth led to an inordinate amount of *non-frivolous* claims facing a TCPA motion to dismiss. Yet, those very claims were limited to non-jury disposition with a limited evidentiary record and no live testimony.<sup>388</sup>

The “preponderance of evidence” standard was removed from the TCPA in its entirety to reduce these concerns. In its place, in Section 27.005(b), the court must dismiss the nonmovant’s claim if the moving party “demonstrates that the legal action is based on or is in response to . . . the [moving] party’s right[s] of” free speech, petition, right of association, or that the media provision covers the claim.<sup>389</sup> Once again, the phrase “relates to” was stricken from Section 27.005(b), narrowing the provision’s application and increasing consistency within the chapter.<sup>390</sup> Although the word “demonstrates” is not defined in the new law, courts will not have unfettered discretion. Whether a case is one to which the TCPA applies is a question of law, which is properly an issue *for the court*.<sup>391</sup> The statutory definitions and evidentiary provisions governing the nonmovant’s prima facie case and the movant’s defenses will determine whether to grant a motion to dismiss. Moreover, questions of law regarding the applicability

384. TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a) (expired Aug. 31, 2019); *id.* § 27.005(b).

385. TEX. CONST. art. 1, § 15; *id.* art. 5, § 10; *see also* State Farm Lloyds v. Nicolau, 951 S.W.2d 444, 455 (Tex. 1997) (explaining the separate roles of judges and juries regarding factfinding).

386. *See* Combined Law Enft Ass’ns of Tex. v. Sheffield, No. 03-13-00105-CV, 2014 WL 411672, at \*11 (Tex. App.—Austin Jan. 31, 2014, pet. denied) (mem. op.) (holding the old TCPA did not violate the Texas Constitution’s open-courts provision).

387. *See* Waggoner, *supra* note 379, at 54–57 (discussing legal challenges faced by the application of Section 27.005(d)); *see also* Mihalic v. City of Houston, No. 01-90-00968-CV, 1991 WL 119198, at \*3 (Tex. App.—Houston [1st Dist.] July 3, 1991, no writ) (not designated for publication) (“Where facts are disputed, defenses ‘in bar’ are not properly disposed of at a preliminary hearing before the court, unless the parties agree or the summary judgment procedure is utilized.”).

388. Waggoner, *supra* note 379, at 54–57.

389. CIV. PRAC. & REM. § 27.005(b).

390. *Compare id.* § 27.005(b), *with id.* (expired June 13, 2013) (including “related to” language).

391. *See generally* J.L. Clark, *A Mixed Question of Law and Fact*, 18 YALE L.J. 404 (1908–1909) (defining a mixed question of law and fact).

of the chapter and the trial court's conclusions are subject to de novo appellate review.<sup>392</sup>

Under the old law, Section 27.005(d) provided for dismissal of the case if the movant established “by a preponderance of the evidence each essential element of a valid defense to the nonmovant’s claim.”<sup>393</sup> Under the new version of that section, a court must dismiss an action if the moving party “establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law.”<sup>394</sup> The statute does not define what is meant by the word “establishes.”<sup>395</sup>

The new law also expands the types of information—and possibly the amount of information—the court can consider when determining whether an action is “subject to”<sup>396</sup> Chapter 27 and whether dismissal is appropriate.<sup>397</sup> In addition to courts considering the pleadings in the case and supporting and opposing affidavits, a court now must accept the types of evidence allowed under the summary-judgment rule: deposition transcripts, interrogatory answers, admissions, stipulations of the parties, and authenticated or certified public records.<sup>398</sup>

The prior statute gave little or no practical guidance about the amount of discovery to allow before disposing of a TCPA motion to dismiss, stating only that “the court may allow specified and limited discovery relevant to the motion.”<sup>399</sup> The 2019 legislation did not amend this language. Consequently, the *scope* of discovery under the TCPA is limited only in that it must target revealing information relevant to the motion. In contrast, the *amount* of discovery must be “specified and limited”—a phrase which may be subject to debate. Notably, a court’s decision regarding the extent of discovery allowed is subject to an abuse of discretion standard of review on appeal.<sup>400</sup>

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392. *See id.* at 412 (“The truth is the mixed question is not a sound philosophical principle in jurisprudence, but a mere subterfuge which affords courts an opportunity to review the evidence on appeal without appearing to do so.”).

393. CIV. PRAC. & REM. § 27.005(d) (expired Aug. 31, 2019).

394. *Id.*

395. *Id.*

396. *Id.* § 27.006(a) (showing “subject to” was added to ensure both movants and nonmovants will not be limited in the evidence allowed under the second and third “prongs” of the TCPA analysis).

397. *Id.*

398. TEX. R. CIV. P. 166a(c).

399. CIV. PRAC. & REM. § 27.006(b).

400. *See In re SSCP Mgmt., Inc.*, 573 S.W.3d 464, 469 (Tex. App.—Fort Worth 2019, no pet.) (“A clear failure by the trial court to analyze or apply the law correctly constitutes an abuse of discretion.” (citing *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992, orig. proceeding))).

In the discovery rules themselves, relevance is a fairly broad concept. A party can seek to discover any information that appears reasonably calculated to lead to the discovery of admissible evidence.<sup>401</sup> Case law, on the other hand, prohibits fishing expeditions.<sup>402</sup> One might assume discovery that would reasonably lead to evidence tending to prove an element of the plaintiff's prima facie case is relevant to the disposition of a motion to dismiss and not a fishing expedition. Court decisions preceding the 2019 amendments to the Act appear to support this conclusion, at least to some extent.<sup>403</sup>

Does the new reference to summary-judgment evidence actually expand the amount of discovery that should be allowed in a TCPA battle? Allowing Rule 166a evidence that may be obtained by relatively unburdensome

401. See TEX. R. CIV. P. 192.3(a) (“In general, a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party.”).

402. See *Loflin v. Martin*, 776 S.W.2d 145, 148 (Tex. 1989) (prohibiting use of request for production to fish for evidence); see also *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180–81 (Tex. 1999) (“[D]iscovery may not be used as a fishing expedition . . . .”); *In re Am. Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998) (per curiam) (“This Court has repeatedly emphasized that discovery may not be used as a fishing expedition.”); *K Mart Corp. v. Sanderson*, 937 S.W.2d 429, 431 (Tex. 1996) (per curiam) (“We reject the notion that any discovery device can be used to ‘fish.’”); *Texaco, Inc. v. Sanderson*, 898 S.W.2d 813, 815 (Tex. 1995) (per curiam) (“Parties must have some latitude in fashioning proper discovery requests. The request in this case is not close; it is well outside the bounds of proper discovery. It is not merely an impermissible fishing expedition; it is an effort to dredge the lake in hopes of finding a fish.”); *Dillard Dep’t Stores, Inc. v. Hall*, 909 S.W.2d 491, 492 (Tex. 1995) (per curiam) (“This is the very kind of ‘fishing expedition’ that is not allowable . . . .”); see also *In re Sears, Roebuck & Co.*, 123 S.W.3d 573, 578 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (defining an improper “fishing expedition” as “one aimed not as supporting existing claims but at finding new ones”); *In re Am. Home Assurance Co.*, 88 S.W.3d 370, 376 (Tex. App.—Texarkana 2002, orig. proceeding) (“[D]iscovery undertaken with the purpose of finding an issue, rather than in support of an issue already raised by the pleadings, would constitute an impermissible ‘fishing expedition’ . . . .”).

403. See, e.g., *In re SSCP Mgmt., Inc.*, 573 S.W.3d at 472 (“Like our sister courts of appeals, we recognize that [s]ome merits-based discovery may also be relevant . . . to the extent it seeks information to assist the non-movant to meet its burden to present a prima facie case for each element of the non-movant’s claims to defeat the motion to dismiss.’ However, any merits-based discovery that is necessarily implicated by discovery relevant to the motion to dismiss ‘must still be “specified and limited” because a prima facie standard generally “requires only the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true.” Presumably, the non-moving party, even after showing ‘good cause’ supporting its need for discovery relevant to the motion to dismiss, would **‘not need multiple or lengthy depositions or voluminous written discovery in order to meet the low threshold to present a prima facie case.’**”) (alteration in original) (citations omitted).

procedures, such as through admissions and interrogatories, in a given case would be consistent with the TCPA's policy of protecting the exercise of constitutional rights by reducing litigation burdens while "at the same time, protect[ing] the rights of a person to file meritorious lawsuits for demonstrable injury"<sup>404</sup>—another of the TCPA's stated purposes. Acquiring and presenting public records that are authenticated or certified can be done with virtually no burden on the opposing party and should be allowed as a matter of course. As a practical matter, the TCPA's time limit for holding the hearing on the motion to dismiss—at most 120 days after service of the motion, when discovery has been allowed<sup>405</sup>—will necessarily limit any tendency to engage in a fishing expedition.

Just as the notice and timing requirements of the new law moved TCPA's procedures closer to summary-judgment practice, the changes to Section 27.005 clarify the standards of proof by making them akin to summary-judgment standards of review<sup>406</sup> and create a more rational alignment between the statute and constitutional rights of access to the courts<sup>407</sup> and jury trials.<sup>408</sup> By doing so, the 2019 amendments likely further insulate the TCPA from constitutional attack on open courts and right to trial by jury grounds.<sup>409</sup> Notably, while the new statute moves the process in the direction of summary judgment, it does not expressly include summary judgment's requirement that there be "no genuine issue as to any material fact"<sup>410</sup> for the dismissal of the case. Nonetheless, by opening avenues to discovery of summary-judgment evidence, a showing of material facts relevant to a motion to dismiss may be easier for the parties, and

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404. CIV. PRAC. & REM. § 27.002.

405. *Id.* § 27.004(c).

406. *See* *Batra v. Covenant Health Sys.*, 562 S.W.3d 696, 708 (Tex. App.—Amarillo 2018, pet. denied) (applying "a standard of review that is essentially equivalent to a motion for summary judgment on an affirmative defense").

407. TEX. CONST. art. I, § 13.

408. *Id.* § 15.

409. *See* *Davis v. Cox*, 351 P.3d 862, 875 (Wash. 2015) (ruling Washington's anti-SLAPP statute violates the state's constitutional right to trial by jury); *Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623, 636 (Minn. 2017) (deciding Minnesota's anti-SLAPP statute violates the state's constitutional right to trial by jury). For an in-depth discussion of the TCPA as it relates to these and other constitutional issues, see Mark C. Walker, *The Texas Anti-SLAPP Law and the Texas Defamation Mitigation Act: Essential Navigation Charts*, in STATE BAR OF TEXAS CLE, ADVANCED CIVIL TRIAL COURSE 64 (2018) (observing the reasoning in *Combined Law Enforcement Association of Texas v. Sheffield*, No. 03-13-00105-CV, 2014 WL 411672 (Tex. App.—Austin Jan. 31, 2014, pet. denied), was undercut by the holding in *Sullivan v. Abraham*, 488 S.W.3d 294 (Tex. 2016)).

410. TEX. R. CIV. P. 166a(c)(ii).

disputes about those facts may be reduced or eliminated beyond what was made possible by the prior law's reliance on pleadings and affidavits alone.

***Effects of decisions on motions to dismiss:*** House Bill 2730 added a new provision that addresses the effects of decisions on motions to dismiss regarding other aspects of the case: "Neither the court's ruling on the motion 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."<sup>411</sup> Thus, early rulings on TCPA motions to dismiss cannot have res judicata effects or even be introduced or considered later in the proceedings.<sup>412</sup>

C. *Sanctions Are No Longer Mandatory: Attorney's Fees and Costs Are*

Under the old law, if a nonmovant failed to meet her burden for establishing a prima facie case by supporting every element of her claim by clear and specific evidence, she would not only have to pay the movant's attorney's fees and court costs but mandatory sanctions, as well.<sup>413</sup> Moreover, there was confusion about whether a court's failure to award sanctions was an abuse of discretion and whether it was sufficient to award a nominal sanction of one dollar.<sup>414</sup>

The Legislature reduced the financial risks faced by the nonmovant by simplifying the damages and costs required under the statute. Under the new law, it will remain mandatory to award attorney's fees and costs to a prevailing movant,<sup>415</sup> however, courts are no longer required to impose sanctions. The court *may* impose sanctions on the nonmovant "as the court

411. TEX. CIV. PRAC. & REM. CODE ANN. § 27.0075.

412. *See id.* (addressing the effect of a ruling).

413. *See Ghrist v. MBH Real Estate LLC*, No. 02-17-00411-CV, 2018 WL 3060331, at \*7 (Tex. App.—Fort Worth, June 21, 2018, no pet.) (mem. op.) ("Civil practice and remedies code section 27.009 mandates that if an action is dismissed under the TCPA, the trial 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.'").

414. *Rich v. Range Res. Corp.*, 535 S.W.3d 610, 615 (Tex. App.—Fort Worth 2017, pet. denied) (holding the trial court did not abuse its discretion by failing to award sanctions as the non-movant "did not need additional deterrence"); *Tatum v. Hersh*, 559 S.W.3d 581, 588 (Tex. App.—Dallas 2018, pet. denied) ("Furthermore, if the trial court determines that the plaintiff does not need deterring from filing similar actions, the court may award a nominal sanction such as \$1.00").

415. *See* CIV. PRAC. & REM. § 27.009(a)(1) (expired Aug. 31, 2019) ("[I]f the court orders dismissal of a legal action under this chapter, the court . . . shall award to the moving party court costs and reasonable attorney's fees incurred in defending against the legal action . . .").

determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.”<sup>416</sup>

The Legislature retained the law’s authorization for a court to award attorney’s fees and costs to a nonmovant when the motion to dismiss was “frivolous or solely intended for delay.”<sup>417</sup> Judicial findings were formerly made only upon the request of a sanctioned movant; under the new law, however, a court that imposes sanctions must now make findings regarding the sanctions even without a request by the movant.<sup>418</sup> There is no similar finding requirement when a nonmovant is sanctioned under the new law’s now-discretionary provision.

House Bill 2730 also addressed the question of sanctions when a compulsory counterclaim meets with a TCPA motion to dismiss. A counterclaim is compulsory “if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction . . . .”<sup>419</sup> The Legislature wrestled with whether to exempt compulsory counterclaims from the TCPA altogether. There was concern that if a TCPA motion to dismiss prevailed against a compulsory counterclaim, it would be unfair to impose attorney’s fees, costs, and sanctions on a party who was forced, by the rules, to either assert the claim in good faith or forfeit it. Under the new TCPA, “the court may award to the moving party reasonable attorney’s fees incurred in defending against the counterclaim if the court finds that the counterclaim is frivolous or solely intended for delay.”<sup>420</sup> Thus, a TCPA motion to dismiss may be brought against a compulsory counterclaim, but the financial risks to a party who pleads in good faith were effectively reduced by this amendment to the TCPA.

Finally, it seems that no litigation epidemic would be complete without an “Oxford Comma”<sup>421</sup> puzzle. The old TCPA provided that the court “shall award to the moving party court costs, reasonable attorney’s fees, and

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416. *Id.* § 27.009(a)(2).

417. *Id.* § 27.009(b).

418. *See id.* § 27.007(a) (“[T]he 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.”).

419. TEX. R. CIV. P. 97(a).

420. CIV. PRAC. & REM. § 27.009(c).

421. *What Is the Oxford Comma?*, LEXICO, <https://www.lexico.com/explore/what-is-the-oxford-comma> [<https://perma.cc/27D2-MGVR>].

other expenses incurred in defending against the legal action as justice and equity may require . . . .”<sup>422</sup> The Texas Supreme Court ruled that although it is within a court’s discretion to determine what constitutes *reasonable* attorney’s fees under the old TCPA, that discretion “does not also specifically include considerations of justice and equity.”<sup>423</sup> The Court reasoned that if the Legislature intended such an analysis, it would have placed a comma after “other expenses” to indicate that “as justice and equity may require” was to modify all items in the series.<sup>424</sup> To avoid any more snares relating to the interpretation of what is and what is not modified by placement of a comma and whether to consider justice and equity, the Legislature simply removed the phrase “as justice and equity may require” from the provision.<sup>425</sup>

### VIII. CONCLUSION

Anti-SLAPP laws have been enacted by many jurisdictions, including Texas, for laudable reasons. They have proven, to widely differing degrees among those jurisdictions, to be effective at shifting the risk-reward calculus of litigation in favor of those who exercise First Amendment rights. This is especially important in the age of the Internet. The seismic shift caused by the 2011 version of the original Texas statute, enacted with nary a word of opposition,<sup>426</sup> reverberated to such a great extent that by the end of 2018 a sufficient number of diverse forces aligned in favor of reform and compelled the Texas Legislature to substantially, yet carefully, overhaul the law.

A product of extensive negotiation, the 2019 reform legislation brought the law closer to its original purpose—the protection of constitutional rights—and to the mainstream of jurisprudence and practice. The rights protected by the new law are more clearly defined by hewing to established principles, and procedures for resolving motions to dismiss more closely aligned with familiar areas of practice. Some new provisions will broaden the sweep of the prior law, including new express media protections and applying it to declaratory relief actions. But, the primary purpose and function of the legislation was to substantially narrow the application of the

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422. CIV. PRAC. & REM. § 27.009(a)(1) (expired Aug. 31, 2019).

423. *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016).

424. *Id.* at 298.

425. *See* CIV. PRAC. & REM. § 27.009(a)(1) (showing deletion of phrase “as justice and equity may require.”).

426. H.J. of Tex., 82d Leg., R.S. 4623 (2011).

TCPA using various techniques, including changing definitions, removing language previously construed as giving the statute extraordinary reach, and exempting additional types of cases from the law altogether.

The new law will likely reduce the number of claims covered under the anti-SLAPP law's umbrella relative to the prior statute, the application of which proved virtually limitless. On the other hand, the new statute is hardly a straitjacket, and there will always be a place for advocacy in this vital realm.