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September 22, 2015

Supreme Court of Texas  
P.O. Box 12248  
Austin, Texas 78711

Re: No. 15-0407; *ExxonMobil Pipeline Company, Robert W. Caudle, and Ricky Stowe v. Travis G. Coleman*

**To the Honorable Members of the Texas Supreme Court:**

Pursuant to Rule 11, Texas Rules of Appellate Procedure, *amicus curiae* Texas Civil Justice League files this amicus brief in the above-referenced cause in support of the Petitioners' Petition for Review.

**Statement of Interest**

The Texas Civil Justice League ("TCJL") is a non-profit association of Texas businesses, health care providers, professional and trade associations, and individuals dedicated to maintaining a fair, balanced, and efficient civil justice system. As one of the civil justice reform organizations that supported legislative enactment of the Texas Citizens Participation Act (Chapter 27, Civil Practice & Remedies Code) ("TCPA"), TCJL has a strong

interest in the proper construction of the statute. TCJL has paid for the preparation of this brief in the ordinary course of its operations.

### **Argument**

TCJL agrees with the Petitioners that the Dallas Court of Appeals' judicial amendment of the TCPA violates well-settled rules of statutory construction, ignores a dispositive ruling of this Court, and defeats the public policy purposes of the Act. This brief will not repeat the Petitioners' compelling arguments with respect to these issues. Instead, TCJL would like to respond to what it views as a significant and disquieting misapplication of the rules of statutory construction that, if followed by other courts, would allow courts to revise legislative enactments with virtual impunity.

In response to periodic crises in the civil justice system resulting from the unprecedented expansion of tort liability in the 1970s and 1980s, the Texas Legislature and this Court have considered and enacted numerous reforms of the civil justice system over the past two decades. Many of these reforms establish pre-trial procedures for screening certain actions to assure that they merit the cost and expense of a full trial. The purpose of these laws is to preserve judicial resources, lower the cost of litigation, bring consistency and predictability to the civil justice system, and, in some cases,

address egregious abuses in certain types of litigation. Notable examples of such laws include:

- The 1995 revisions to the Deceptive Trade Practices Act (Chapter 17, Business & Commerce Code), specifically § 17.505, requiring a claimant to give pre-suit notice as a condition to maintaining a claim and allowing a defendant an opportunity to inspect;
- The 1997 adoption by this Court of Rule 166a(i), Texas Rules of Civil Procedure, recognizing no evidence motions for summary judgment;
- The enactment in 1999 of Chapter 147, Civil Practice & Remedies Code, requiring a claimant to give pre-suit notice of a claim based on a Year 2000 computer date failure and giving a defendant the right to inspect and cure a defect;
- The 2003 enactment of Chapter 74, Civil Practice & Remedies Code, governing health care liability claims, specifically § 74.351, requiring a claimant to serve an expert report in order to maintain an action against a physician or health care provider;
- This Court's adoption in the same year, at the direction of the Legislature, of Rule 42, governing the certification of class actions;
- The 2005 enactment of Chapter 90, Civil Practice & Remedies Code, relating to asbestos and silica claims, particularly § 90.003 (requiring

a claimant to serve a qualifying medical report of a board certified physician in order to maintain an action) and § 90.010 (establishing asbestos and silica multi-district litigation courts to determine if whether medical claims meet statutory standards before returning them to their courts of origin for trial).

The TCPA, enacted in 2011, belongs to this series of civil justice reforms. As Petitioners point out, the “Legislature enacted the TCPA to provide an early dismissal mechanism for meritless suits based on communications falling under the statute.” (Pet. 3.) While one of the purposes of the TCPA is undoubtedly to help prevent abusive SLAPP lawsuits,<sup>1</sup> the Legislature did not limit the application of the statute to those claims alone. The early dismissal mechanism in the statute applies to *any* legal action based on, relating to, or in response to “a party’s exercise of the right of free speech, right to petition, or right to association.” TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a). The Court of Appeals obfuscates the plain meaning of the statute, in our view both unnecessarily and impermissibly, by dragging the purpose statement contained in § 27.002 into

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<sup>1</sup> SLAPP is commonly understood to be an acronym for “strategic lawsuits against public participation.” A number of states have enacted “anti-SLAPP” statutes to provide an early dismissal procedure for SLAPP suits. While some courts have referred to the TCPA as an anti-SLAPP statute, neither the terms “SLAPP” nor “strategic lawsuit against public participation” appear in the text of the TCPA.

its analysis. As Petitioners also note, that statement does not by its own terms express an “intent” to limit the applicability of the statute to SLAPP suits.

But even if it did, a statement of purpose in a statute in no way determines, much less expands or restricts, the interpretation of the statute itself. At best purpose statements are hortatory in nature, stating general policy arguments in favor of proposed legislation or identifying supposed abuses that the statute purports to address. But according to the Texas Legislative Council, the bill-drafting agency of the Legislature:

Statements of policy or purpose are rarely needed and generally should be avoided. . . . A more serious misuse of purpose or policy statements is their use to try to compensate for careless drafting, to state, in effect, that “this Act may not say very clearly what it really means. What it is trying to say is . . .”<sup>2</sup>

A short title, the Legislative Council also tells us, “is used to supply a convenient way of citing a cohesive body of law that deals comprehensively

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<sup>2</sup> Texas Legislative Council Drafting Manual, April 1985, 3-16. The Council goes on to cite only two examples of when a purpose clause “may be useful”: (1) “when the operative provisions do not clearly indicate what the bill is intended to accomplish”; and (2) “when a *substantial* body of new law is introduced; see, for example, Section 1.02, Penal Code” (emphasis added). Neither exception applies here: the “operative provisions” of the statute are clear on their face, and the TCPA does not introduce a “substantial body of new law.”

with a subject.”<sup>3</sup> Simply put, purpose statements and titles are matters of short-hand convenience, not aids to statutory construction.

Here, the Court of Appeals misapplied the title and purpose of the TCPA as a justification for judicially amending the unambiguous statutory definition of “exercise of right of association.”<sup>4</sup> In this way, the Court of Appeals sought to “fill in” something that it believed the Legislature left out: a “public” or “citizen’s” participation requirement. Given the Legislature’s track record in the last two decades of enacting statutes protecting civil defendants from meritless litigation of various types, it clearly intended to extend that protection to speech-chilling lawsuits targeting communications between employees involving potentially serious environmental and economic concerns in defense of a shared interest. It cannot be suggested that the Legislature’s decision was in any way “absurd.”

This statute has now been in effect for more than four years, and two legislative sessions have come and gone since then. In fact, the TCPA has been amended twice since 2011 in ways that enhance the statute’s protections and clarify the scope of its application. For example, in 2013, in addition to certain procedural changes, the Legislature explicitly required the

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<sup>3</sup> Texas Legislative Council Drafting Manual, April 1985, 3-15. The Council goes on to note that “[S]hort titles are appropriate for major acts but should not be used to make otherwise routine bills look important.”

<sup>4</sup> See Op. at 10-12.

court to dismiss an action if the defendant establishes by a preponderance of the evidence each essential element of a valid defense to the claim. At the same time, the Legislature clarified that the statute *does not apply* to actions brought under the Insurance Code or arising from insurance contracts or the sale of insurance services.<sup>5</sup> The very fact that the Legislature reexamined the statute and passed legislation excluding specific transactions but not others strongly indicates that it knows what it is doing and would have excluded the types of communications at issue here if that was its intention. In 2015, moreover, the Legislature revisited the statute once more, clarifying the scope of the truth defense in a suit against a newspaper or other periodical or broadcaster involving the allegations of a third party in matters of public concern.<sup>6</sup> Clearly, the Legislature has been more than willing to tailor the TCPA to prevent “unintended” consequences or to improve its operation. Just as clearly, the Legislature is the proper forum to do that, not the courts.

For these reasons, TCJL urges this Court to grant the Petition for Review and correct the Dallas Court of Appeals’ erroneous ruling.

Respectfully submitted,

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<sup>5</sup> H.B. 2935, Enrolled version, 83<sup>rd</sup> Leg., R.S. (2013).

<sup>6</sup> S.B. 627, Enrolled version, 84<sup>th</sup> Leg., R.S. (2015).

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### **CERTIFICATE OF COMPLIANCE**

I certify that this document contains 1,274 words in the portions of the document that are subject to the word limits of Texas Rule of Appellate Procedure 9.4(i), as measured by the undersigned's word-processing software.

*/s/ George S. Christian*  
George S. Christian

### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing *amicus* letter has been served to all attorneys of record as listed below on September 22, 2015.

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