

IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE
ELEVENTH JUDICIAL DISTRICT AT CHATTANOOGA

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MIKE BEDSOLE, d/b/a/)
TINY HOUSE CHATTANOOGA,)
)
Plaintiff,)
)
v.)
)
SINCLAIR BROADCAST GROUP, INC.,)
et al.,)
)
Defendants.)

Docket No. 20-C-649
Division IV
Hon. Kyle R. Hedrick

RESPONSE OF ATTORNEY GENERAL TO CONSTITUTIONAL CHALLENGE

Comes that Attorney General and Reporter for the State of Tennessee and hereby submits this Response to Plaintiff's challenge to the constitutionality of the Tennessee Public Participation Act, Tenn. Code Ann. §§ 20-17-101, *et seq.*

INTRODUCTION AND BACKGROUND

Plaintiff is a Tennessee-based manufacturer of homes typically under 400 square feet which Plaintiff refers to as "tiny homes." In June 2019, Defendants WTVC-TV News Channel 9, Luther and Curtin broadcast a new story concerning Plaintiff which Plaintiff asserts was false and defamatory. Plaintiff subsequently filed suit against these Defendants (the "Sinclair Defendants") and others (the "ABC Defendants") asserting claims for libel, false light invasion of privacy, intentional infliction of emotional distress, negligent infliction of emotional distress, and intentional interference with business relationships.

The Defendants have filed motions to dismiss Plaintiff's complaint pursuant to Tenn. R. Civ. P. 12. Additionally, Defendants have filed petitions to dismiss the complaint pursuant to the Tennessee Public Participation Act, Tenn. Code Ann. §§ 20-17-101, *et seq.* ("TPPA"). Pursuant to the provisions of Tenn. Code Ann. § 20-17-104, the Defendants seek to have Plaintiff's Complaint dismissed, asserting that it was filed in response to Defendants' exercise of their rights of free speech and association. In response, Plaintiff has asserted a facial challenge to the constitutionality of the TPPA – arguing that it violates the separation of powers provisions of Article II, §§ 1 and 2 of the Tennessee Constitution.

RELEVANT STATUTORY PROVISIONS

The Tennessee Public Participation Act ("TPPA") is what is known as an "anti-SLAPP" (strategic lawsuits against public participation) law. The primary purpose of such laws is to discourage the filing of SLAPP suits and to prevent them from chilling protected speech. As of January 2021, thirty states and the District of Columbia have passed Anti-Slapp laws.¹ While Tennessee has had a version of an anti-SLAPP law since 1997², the TPPA was passed by the Tennessee General Assembly in 2019 and "is intended to provide an additional substantive remedy to protect the constitutional rights of parties and to supplement any remedies which are otherwise available to those parties under the common law, statutory law, or constitutional law or under the Tennessee Rules of Civil Procedure." Tenn. Code Ann. § 20-17-101.

¹ Currently, the state of Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Vermont and Virginia, in addition to Tennessee, have passed anti-SLAPP laws.

²See Tennessee Anti-SLAPP Act of 1997, Tenn. Code Ann. § 4-21-1001 – 1004. This Act provides limited statutory immunity to persons making "good faith reports of wrongdoing to appropriate governmental bodies." Tenn. Code Ann. § 4-21-1002(a).

In enacting the TPPA, the General Assembly expressly stated that the purpose of the Act is “to encourage and safeguard the constitutional rights of persons to petition, to speak freely, to associate freely, and to participate in government to the fullest extent permitted by law and, at the same time protect the rights of persons to file meritorious lawsuits for demonstrable injury.” Tenn. Code Ann. § 20-17-102. The General Assembly further declared that the Act is “consistent with and necessary to implement the rights protected by Article I, §§ 19 and 23 of the Constitution Tennessee” as well as the First Amendment, and “shall be construed broadly to effectuate its purposes and intent.” *Id.*

The TPPA authorizes a party to petition the court to dismiss any legal action filed in response to that party’s exercise of the right of free speech, right to petition, or right of association. Tenn. Code Ann. § 20-17-104(a). And as one of the purposes of the Act is to resolve the action at an early stage, the TPPA requires that such a petition must be filed within sixty (60) days from the date of the service of the legal action. Tenn. Code Ann. § 20-17-104(b).

Upon filing a petition under the TPPA, the petitioning party has the “burden of making a prima facie case that a legal action against the petitioning party is based on, relates to, or is in response to that party’s exercise of the right to free speech, right to petition, or right of association.” Tenn. Code Ann. § 20-17-105(a). If the petitioning party meets this burden, then the burden shifts to the responding party “to establish a prima facie case for each essential element of the claim the legal action.” Tenn. Code Ann. § 20-17-105(b). If the responding party fails to meet this burden, then the court “shall dismiss the legal action.” *Id.* Additionally, even if the responding party meets their burden, if the petitioning party establishes a valid defense to the claims, then the court shall also dismiss the matter. Tenn. Code Ann. § 20-17-105(c). If, however, the responding party meets their burden, then the petition to dismiss is denied. In determining whether a petition to dismiss

should be granted or denied, the court “may base its decision on supporting and opposing sworn affidavits stating admissible evidence upon which the liability or defense is based and on other admissible evidence presented by the parties.” Tenn. Code Ann. § 20-17-105(d).

A trial court’s decision either granting or denying a petition to dismiss under the TPPA is immediately appealable as a matter of right. Tenn. Code Ann. § 20-17-106. Additionally, if a trial court grants a petition to dismiss under the TPPA, it “shall award to the petitioning party” costs and attorney’s fees. Tenn. Code Ann. § 20-17-107. Similarly, if a trial court finds that a petition brought under the TPPA was frivolous or filed solely for the purpose of unnecessary delay, the court may award costs and attorney’s fees to the responding party. *Id.*

Finally, while the TPPA is intended to provide an additional substantive remedy, it expressly declares that nothing in the Act “[a]ffects, limits or precludes the right of any party to assert any defense, remedy, immunity, or privileged otherwise authorized by law,” nor can the TPPA affect the substantive law governing any asserted claim. Tenn. Code Ann. § 20-71-108(4) and (5).

STANDARD OF REVIEW OF CONSTITUTIONAL CHALLENGE

It is well-settled law in Tennessee that “courts do not decide constitutional questions unless resolution is absolutely necessary to determine the issues in the case and adjudicating the rights of the parties.” *State v. Taylor*, 70 S.W.3d 717, 720 (Tenn. 2002) (citing *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995)). When examining the constitutionality of a statute, courts are bound by the “presumption that an act of the General Assembly is constitutional” and must indulge every presumption and resolve every doubt in favor of the statute’s constitutionality. *Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003). The Supreme Court recently articulated the “general burden” a plaintiff faces in challenging the constitutionality of a statute:

“In evaluating the constitutionality of a statute, we begin with the presumption that an act of the General Assembly is constitutional.” “[I]n reviewing [a] statute for a possible constitutional infirmity, we are required to indulge every presumption and resolve every doubt in favor of the constitutionality of the statute.”

“The Court must uphold the constitutionality of a statute whenever possible[.]” “[T]he Court must be controlled by the fact that our Legislature may enact any law which our Constitution does not prohibit, and the Courts of this State cannot strike down one of its statutes unless it clearly appears that such statute does contravene some provision of the Constitution.”

Fisher v. Hargett, 604 S.W.3d 381, 397 (Tenn. 2020) (quoting *Willeford v. Klepper*, 597 S.W.3d 454, 465 (Tenn. 2020) (citations omitted)).

Furthermore, “[i]t is well-recognized . . . that ‘[a] facial challenge to a legislative [a]ct is . . . the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exist under which the Act would be valid.’” *State v. Crank*, 468 S.W.3d 15, 24-25 (Tenn. 2015) (quoting *Davis-Kidd Booksellers, Inc.*, 866 S.W.3d at 525 (second alteration in original) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987))). Courts considering a facial challenge to a statute should proceed with caution and restraint because holding a statute facially unconstitutional may result in unnecessary interference with legitimate governmental functions. *Waters v. Farr*, 291 S.W.3d 873, 922 (Tenn. 2009). The Tennessee Supreme Court has recognized that there are at least three reasons why courts should be reticent to invalidate statutes on their face:

First, claims of facial invalidity often rest on speculation and thus run the risk of the ‘premature interpretation of statutes on the basis of factually barebones records.’ Second, facial challenges ‘run contrary to the fundamental principle of judicial restraint’ by inviting the courts to ‘formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.’ Third, ‘facial challenges threaten to short circuit the democratic

process by preventing laws embodying the will of the people from being implemented in a manner constituent with the Constitution.’

Id. (citations omitted).

Thus, facial invalidation is “strong medicine” which must be invoked sparingly, *id.*, and “[i]f even one set of circumstances exists in which the state can constitutionally apply the statute[] . . . plaintiffs’ claim fails.” *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 692 (6th Cir. 2015).

ARGUMENT

Plaintiff asserts a facial challenge to the TPPA arguing that the Act infringes on the power of the judicial branch to promulgate rules governing the practice and procedure of the courts because it allegedly directly contradicts Rules 8 and 12 of the Tennessee Rules of Civil Procedure. (Plff’s Memorandum at 25-26.)

The Tennessee Constitution provides for the separation of powers between the Legislative, Executive, and Judicial departments of state government. Tenn. Const. art. II, §§ 1 and 2. “While there are no precise lines of demarcation in the respective roles of our three branches of government, the traditional rule is that the legislative [branch] [ha]s the authority to make, order, and repeal [the last], the executive . . . to administer and enforce, and the judicial . . . to interpret and apply.” *Mansell v. Bridgestone Firestone N. Am. Tire, LLC*, 417 S.W.3d 393, 402 (Tenn. 2013 (quoting *Underwood v. State*, 529 S.W.2d 45, 47 (Tenn. 1975))). Article II, section 2 of the Tennessee Constitution “prohibits one branch from encroaching on the powers or functions of the other two branches.” *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 843 (Tenn. 2008).

However, the three branches will have some overlap because “it is impossible to preserve perfectly the theoretical lines of demarcation between the executive, legislative and judicial branches of government.” *Underwood*, 529 S.W.2d at 47. The Tennessee Supreme Court has “long held the view that comity and cooperation among the branches of government are beneficial

to all.” *State v. Mallard*, 40 S.W.3d 473, 481 (Tenn. 2001). Thus, “[i]t is only by remembering the limits of the power confided to the judicial department of government, and respecting the independence of the other departments, that the judiciary can maintain its own independence in the proper sense of the term.” *Mansell*, 417 S.W.3d at 402.

A. The TPPA Does Not Violate the Separation of Powers Doctrine Because It Is a Substantive/Remedial Law.

In applying the separation of powers doctrine in cases involving a facial attack on a state statute, courts first should determine whether the statute being challenged is predominantly substantive, remedial, or procedural in nature. The Tennessee Supreme Court defines substantive law as “that part of the law which creates, defines, and regulates rights; that which creates duties, rights, and obligations; the law which relates to rights and duties which give rise to a cause of action.” *Solomon v. FloWarr Management, Inc.*, 777 S.W.2d 701, 705 (Tenn. Ct. App. 1989) (citation omitted). Remedial laws are defined as “providing means or method whereby causes of action may be effectuated, wrongs redressed and relief obtained. . . .” *Tenn. Dep’t of Human Services v. Defriece*, 937 S.W.2s 954, 958 (Tenn. Ct. App. 1996). The Tennessee Supreme Court has further characterized a remedial law as one “that gives a party a new or different remedy when the existing remedy, if any, is inadequate.” *In re D.A.H.*, 142 S.W.3d 267, 273 (Tenn. 2004). Procedural laws simply establish the mode or proceedings by which legal rights are enforced. *State v. Hanners*, 235 S.W.3d 609, 612 (Tenn. Crim. App. 2007); *see also Spencer Kellogg & Sons, Inc v. Lobban*, 315 S.W.2d 514, 518 (Tenn. 1958) (“procedural law is merely the machinery of carrying out a lawsuit”).

Statutes enacted by the General Assembly that are substantive or remedial in nature normally do not infringe on the powers of the judicial power. *See, e.g., Mallard*, 40 S.W.3d at 481 (recognizing that the General Assembly’s constitutional authority to enact substantive laws does

not violate the separation of powers doctrine); *Caudill v. Foley*, 21 S.W.3d 203, 210-211 (Tenn. Ct. App. 1999) (holding that Tenn. Code Ann. § 36-6-108 is remedial in nature and therefore does not violate the separation of powers doctrine); *In re C. M. v. Phillips*, No. E2001-00211-COA-R3-CV, 2001 WL 920209 (Tenn. Ct. App. Aug. 15, 2001) (holding that attorney's fee-award provision in Tenn. Code Ann. § 36-3-617(a)(1) is remedial in nature and therefore does not violate separation of powers doctrine); *see also McClay v. Airport Management Services, LLC*, 596 S.W.3d 686, 691-92 (noting that the Legislature determines public policy and thus "what causes of action a plaintiff may bring, or what remedies a plaintiff may seek, are matters of law subject to determination by the legislature) (citations omitted).

Here, contrary to Plaintiff's assertions, the TPPA is not a procedural statute but rather a substantive and/or remedial statute that does not encroach on the judiciary's powers. In enacting the TPPA, the General Assembly specifically declared that the Act was "intended to provide an *additional substantive remedy* to protect the constitutional rights of parties and to supplement any remedies which are otherwise available to those parties" under existing law. Tenn. Code Ann. § 20-17-109 (emphasis added). The General Assembly further declared that the remedy provided by the TPPA is "necessary to implement the rights protected by [the] Constitution of Tennessee, Article I, §§ 19 and 23, as well as the by the First Amendment to the United States Constitution, and shall be construed broadly to effectuate its purposes and intent." Tenn. Code Ann. § 20-17-102. Thus, as stated, the TPPA provides an "additional substantive remedy" for the redress of wrongs inflicted by violation of individual's constitutional rights. "It is within the province of the General Assembly, not the judiciary, to establish and control the remedies that are available to persons seeking judicial relief." *Caudill v. Foley*, 21 S.W.3d at 210 (citing *Pacific E. Corp. v. Harpeth Village Dev. Co.*, 902 S.W.2d 946, 955 (Tenn. Ct. App. 1995)); *see also Nat'l Life & Acc.*

Ins. Co. v. Atwood, 194 S.W.2d 350, 353 (Tenn. Ct. App. 1946) (“Legislature is free to . . . substitute new remedies for old and there is no vested right to a particular remedy”) (citing *Lunati v. Progressive Bldg. & Loan Ass’n*, 67 S.W.2d 148 (Tenn.)).

Moreover, the provisions of the TPPA do not mandate any particular result but leave the ultimate decision within the discretion of the trial court. For example, under section 20-17-105(a), the trial court must determine whether the petitioning party has made a prima facie case that a legal action against the petitioning party is “based on, relates to, or is in response to that party’s exercise of the right to free speech, right to petition, or right of association.” And in determining whether such a prima facie showing has been made, the trial court must determine whether the petitioning party’s “exercise of the right of free speech” or “exercise of the right of petition” meets the limited statutory definitions contained in section 20-17-103(3), (4) and (6). Additionally, under section 20-17-105(b), the trial court must determine whether the responding party has established a prima facie case for each essential element of a claim. None of these provisions remove from the trial court its authority to interpret and apply the applicable law—indeed the TPPA specifically states that nothing in the Act shall “[a]ffect[] the substantive law governing any asserted claim,” nor [a]ffect[], limit[], or preclude[] the right of any party to assert any defense, remedy, immunity or privilege otherwise authorized by law.” Tenn. Code Ann. § 20-17-108(4), (5).

In short, the TPPA does not infringe on the powers of the Courts guaranteed under the Tennessee Constitution; the trial court’s discretion is not impaired, nor is its fact-finding process and authority to interpret and apply the law. Rather, the TPPA is a substantive/remedial statute that is to be construed broadly to effectuate its purpose and, therefore, does not violate the

separation of powers doctrine as established by Article II, section 2 of the Tennessee Constitution.³ See *Caudill*, 21 S.W.3d at 210-211.

B. The TPPA Does Not Conflict With the Tennessee Rules of Civil Procedure.

Plaintiffs argues that the TPPA conflicts with Rules 8 and 12 of the Tennessee Rules of Civil Procedure and, therefore, impermissibly encroaches on the powers of the Judicial Branch to promulgate rules governing the practice and procedure of Tennessee courts. But the Tennessee Supreme Court has recognized that consent to “the application of procedural or evidentiary rules promulgated by the legislature . . . is sometimes necessary to foster a workable model of government.” *Mallard*, 40 S.W.3d at 481. Thus, there are numerous procedural rules in the Tennessee Code that supplement judicial rules. See, e.g., Tenn. Code Ann., Title 16 “Courts” (containing rules setting forth subject-matter jurisdiction of the courts); Tenn. Code Ann., Title 20, “Civil Procedure” (containing rules pertaining to bringing and maintaining court actions); Tenn. Code Ann., Title 24 “Evidence and Witnesses” (containing numerous evidentiary rules); and Tenn. Code Ann., Title 28, “Limitations of Actions” (containing rules setting forth statutes of limitation and repose). The legislature also approves the rules promulgated by the Tennessee Supreme Court, including the Rules of Civil Procedure. See Tenn. Code Ann. § 16.3.404.

The Tennessee Supreme Court has consented to the legislature’s procedural or evidentiary rules when the statutes “(1) are reasonable and workable within the framework already adopted by

³ Plaintiff also argues that the Act simply does not apply to this matter as the events giving rise to Plaintiff’s legal action took place before the effective date of the Act. See Pliff’s Memorandum at 24-25. However, this argument is contrary to the express language of Public Chapter 185 which states that the act shall take effect July 1, 2019 and “shall apply to any legal action commenced on or after the effective date of this act.” Plaintiff did not file this cause of action until June 25, 2020, well after the effective date of the Act. See Acts of 2019, Pub. Ch. 185, § 2. Moreover, the Tennessee Supreme Court has specifically recognized that a statute which furnishes a new remedy “is applicable to proceedings begun after its passage, though relating to acts done previously thereto.” *Dowlen v. Fitch*, 264 S.W.2d 824, 826 (Tenn. 1954) (finding that statute applied to causes of actions which were in esse at the time of the effective date of the act); see also *Saylors v. Riggsbee*, 544 S.W.2d 609, 610 (Tenn. 1976) (holding that statute applied to causes of action arising before such acts become law).

the judiciary, and (2) work to supplement the rules already promulgated by the Supreme Court.” *Mallard*, 40 S.W.3d at 481. In addition, “where a decision of the legislature chiefly driven by public policy concerns infringes on [the Court’s inherent power to prescribe rules for practice and procedure in the state’s courts] we will generally defer to the judgment of the legislature.” *Biscan v. Brown*, 160 S.W.3d 462, 474 (Tenn. 2005).

Accordingly, to the extent that this Court determines that the TPPA is *not* a substantive/remedial statute, but is purely procedural, the Act clearly meets this standard and, therefore, does not violate the separation of powers doctrine.

1. Deference to the Legislature is appropriate because the TPPA is predicated on public-policy concerns.

It is well settled that “[q]uestions of public policy not determined by the [Tennessee] Constitution are within the exclusive power of the Legislature.” *Cooper v. Nolan*, 19 S.W.2d 274, 276 (Tenn. 1929). The legislature’s police power “embraces all matters reasonably deemed necessary or expedient for the safety, health, morals, comfort, domestic peace, private happiness, and welfare of the people.” *Wagner v. Elizabethton City Bd. of Educ.*, 496 S.W.2d 468, 471 (Tenn. 1973 (internal citations omitted)). Further, the Tennessee Supreme Court has long recognized that “areas exist in which both the legislative and judicial branches have interests, and that in such areas both branches may exercise appropriate authority.” *Newton v. Cox*, 878 S.W.2d 105, 111 (Tenn. 1994). Accordingly, “[a] legislative enactment which does not frustrate or interfere with the adjudicative function of the courts does not constitute an impermissible encroachment upon the judicial branch of government.” *Underwood v. State*, 529 S.W.2d at 47.

In *Newton*, the Supreme Court upheld the constitutionality of Tenn. Code Ann. § 29-26-120 (attorney fee cap in medical malpractice cases), finding that the statute “is supplemental to and in aid of Disciplinary Rule 2-106(A)” and a “constitutional declaration of the public policy of

this state with regard to contingency attorney fee contracts in medical malpractice cases.” *Id.* at 112. Similarly, in *Petition for Rule of Court Activating, Integrating, and Unifying the State Bar of Tennessee*, 282 S.W.2d 782 (Tenn. 1955), the Court upheld the constitutionality of a statute prohibiting any individual being denied admission to the bar on the basis of not belonging to any club, association, or guild, stating:

The inherent right of Courts to prescribe qualifications necessary for the practice of law does not mean that the Legislature is without authority in that field. . . . Thus, a legislative requirement that individuals who would practice this profession must first meet certain reasonable conditions and qualifications is only the exercise by the Legislature of the police power with which that department of government is vested.

282 S.W.2d at 784.

More recently, Tennessee appellate courts have upheld the constitutionality of statutes enacted based on substantive public policy objectives of controlling the cost of health care and benefitting the general welfare of the State’s citizens. .” *See Webb v. Roberson*, No. W2012-01230-COA-R9-CV, 2013 WL 1645713, at *9 (Tenn. Ct. App. Apr. 17, 2013) (finding Tenn. Code Ann. § 29-26-121’s pre-suit notice requirement in medical malpractice actions did not violate separation of powers doctrine because it was based on “legislature’s substantive policy concerns” and supplemented Rule 3) and *Jackson v. HCA Health Services of Tenn., Inc.*, 383 S.W.3d 497, 506-07 (Tenn. Ct. App. 2012) (finding the contemporaneous filing of a certificate of good faith with a medical malpractice complaint required by Tenn. Code Ann. § 29-26-122 did not violate separation of powers because requirement that plaintiff conduct a due diligence inquiry prior to filing medical malpractice action was not in conflict with Tenn. R. Civ. P. 3). Indeed, in *Webb*, the Tennessee Court of Appeals noted that the objectives of “preventing protracted litigation through early investigation and possibly, facilitating early resolution through settlement . . . are of

particular importance in the context of medical malpractice claims where . . . increased malpractice insurance costs threaten both health care affordability and accessibility. 2013 WL 1645713, at *19.

Deference to the legislature is appropriate here because the TPPA addresses similar important public-policy goals—"to encourage and safeguard the constitutional rights of persons to petition, to speak freely, to associate freely, and to participate in government to the fullest extent permitted by law" by protecting such persons from frivolous or nuisance lawsuits while at the same time "protect[ing] the rights of persons to file meritorious lawsuits for demonstrable injury."⁴ See Tenn. Code Ann. § 20-17-102. The TPPA "does not bar a plaintiff from litigating an action that arises out of the defendant's free speech or petition; rather it subjects to potential dismissal only those actions in which the plaintiff cannot state and substantiate a legally sufficient claim," *Jarrow Formulas, Inc. v. LaMarche*, 74 P. 3d 737, 744 (Ca. 2003) (internal citations and quotation marks omitted), thereby appropriately balancing these competing public policy goals. See *Mills v. Wong*, 155 S.W.3d 916, 923 (Tenn. 2005) ("The Tennessee General Assembly itself has the power to weigh and to balance competing public and private interests in order to place reasonable limitations on rights of action in tort which it also has the power to create or to abolish.").

2. The TPPA is reasonable and workable within the framework adopted by the Judiciary.

There are numerous examples—both statutorily-created and judicially-created—of a burden-shifting framework being applied by Tennessee courts in analyzing a particular case. For example, Tennessee courts regularly employ the "*McDonnell Douglas*" framework in resolving

⁴ In upholding the constitutionality of its anti-SLAPP statute, the Rhode Island Supreme Court stated that it reflected the inscription on the state capitol: "Rara temporum felicitas ubi sentire quae valis et quae sentias dicere licet" ("Rare felicity of the times when it is permitted to think what you wish and to say what you think.") See *Hometown Properties, Inc. v. Fleming*, 680 A.2d 56, 64 (R.I. 1996).

employment discrimination and retaliation claims at the summary judgment stage. *See Yount v. FedEx Express*, No. W2015-00389-COA-R3-CV, 2016 WL 1056958, at *4-7 (Tenn. Ct. App. Mar. 17, 2016) (holding that the *McDonnell Douglas* framework applies in Tennessee to analyze discrimination claims at the summary judgment stage). Under that framework, the plaintiff has the initial burden of proving by the preponderance of the evidence a prima facie case of discrimination. If the plaintiff is successful, the burden then shifts to the defendant to articulate some legitimate, non-discriminatory reason for its actions, but then the plaintiff has the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were a pretext for discrimination. *Versa v. Policy Studies, Inc.*, 45 S.W.3d 575, 580 (Tenn. Ct. App. 2000) (citations omitted).

In Tennessee's "whistleblower legislation," the Tennessee Public Protection Act⁵, the General Assembly has established a similar burden-shifting framework that "shall apply at all stages of the proceedings, including motions for summary judgment." *See* Tenn. Code Ann. § 50-1-304(f). And in *Woodson v. Porter Brown Limestone Co., Inc.*, 916 S.W.2d 896 (Tenn. 1996), the Tennessee Supreme Court adopted the burden-shifting procedure outlined in *Batson v. Kentucky*, 476 U.S. 79 (1986) as the appropriate procedure for challenging racially-based juror exclusions on equal protection grounds. 916 S.W.3d at 902. Under that procedure, the defendant must first establish "a prima facie case of purposeful discrimination". Once that showing is made, the state is then required to demonstrate a neutral explanation for the exclusion. If such an explanation is given, "the trial court must determine whether, given all the circumstances, the

⁵ The Tennessee Public Protection Act (ironically also referred to as the "TPPA") provides statutory protection to employees for both (1) discharge in retaliation for refusing to remain silent about illegal activities and (2) discharge in retaliation for refusing to participate in illegal activities. *VanCleave v. Reelfoot Bank*, No. W2008-01559-COA-R3-CV, 2009 WL 3518211, at ** (Tenn. Ct. App. Oct. 30, 2009).

defendant has established purposeful discrimination,” and if so, then the juror may not be excluded. *Id.* at 903.

As these examples demonstrate, the TPPA is entirely consistent with similar burden-shifting schemes employed by Tennessee courts and thus is reasonable and workable within the framework adopted by the judiciary. *See, e.g., Varan Medical Systems, Inc. v. Delfino*, 106 P.3d 958, 966 (Ca. 2005) (noting that California’s anti-SLAPP statute “establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary judgment-like procedure at an early stage of the litigation”).

3. The TPPA supplements the Rules of the Judiciary.

Just as there are numerous examples where Tennessee appellate courts have adopted a burden-shifting framework, there are numerous statutes those same courts have upheld against separation-of-powers challenges because the challenged provisions do not directly conflict with the rules promulgated by the judiciary. *See, e.g., Mansell*, 417 S.W.3d at 404-406 (finding that the medical-impairment-rating statutes in the workers’ compensation scheme are not in conflict with the Rules of Evidence); *Webb v. Roberson*, 2013 WL 1645713, at *9 (finding that statute’s pre-suit notice requirement did not conflict with Court’s procedural rules). In fact, in *Webb*, the Court found that the purposes of the statute “supplement the Rules of Civil Procedure, which are to ‘be construed to secure the just, speedy, and inexpensive determination of every action,’ Tenn. R. Civ. P. 1.” *Id.*

Likewise, the TPPA does not impermissibly infringe upon the judiciary’s power to control the practice and procedure of the courts. As discussed in section A, *supra*, the TPPA does not in any way frustrate or interfere with the adjudicative function of the courts; it does not require courts to resolve disputed issues of fact or to dismiss claims that would survive summary judgment or a

motion for directed verdict. *See Gifford v. Taunton Press, Inc.*, No. DBDCV186028897S, 2019 WL 3526461, at *8 (Conn. Super. Ct. July 11, 2019) (upholding constitutionality of Connecticut’s anti-SLAPP statute noting that the “statute does not provide a mechanism for dismissing meritorious claims—claims that would survive in its absence and, thus, does not violate a plaintiff’s constitutional rights any more than other statutes or rules that permit a court to dismiss a claim before or after it is heard by a jury”).

Moreover, contrary to Plaintiff’s assertions, the requirement that a responding party establish “a prima facie case for each essential element of the claim in the legal action” does not place an additional burden on a plaintiff in conflict with Tennessee Rules of Civil Procedure, as the requirement of establishing a prima facie case is “an evidentiary standard, not a pleading requirement.” *Wilson v. Rubin*, 104 S.W.3d 39, 50 (Tenn. Ct. App. 2002) (citing *Swierkiewicz v. Sorema*, 534 U.S. 506, 510-11 (2002)). Moreover, the Tennessee Supreme Court has recognized that the “burden to establish a prima facie case is not onerous.” *Williams v. City of Burns*, 465 S.W.3d 96, 113-114 (citing *Lin v. Metro Gov’t of Nashville and Davidson Cty.*, No. M2008-00212-COA-R3-CV, 2008 WL 4613559, at *5 (Tenn. Ct. App. Oct. 10, 2008)); *see also Saunders v. Anderson*, 746 S.W.2d 185, 190 (Tenn. 1987).

Finally, the objectives of the TPPA supplement those of the Rules of Civil Procedure, “which are to be construed to secure the just, speed and inexpensive determination of every action.” *See* Tenn. Code Ann. § 20-17-102; Tenn. R. Civ. P. 1; *see also Davis v. Parks*, 130 Nev. 1169 at *2 (Nev. 2014) (finding that Nevada’s anti-SLAPP statutes do not violate the separate of powers because the “statutes aid the judiciary by conserving judicial resources, saving the parties from incurring unnecessary expenses, and preventing the parties from prolonging meritless cases”).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response has been sent by electronic transmission and/or by U.S. Mail, postage prepaid, to:

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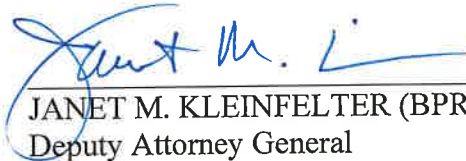
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CONCLUSION

For these reasons, the Attorney General respectfully requests that this Court dismiss in its entirety and with prejudice Plaintiff's facial challenge to the constitutionality of the Tennessee Public Participation Act, Tenn. Code Ann. §§ 20-71-101, *et seq.*, under art. II, §§ 1 and 2, of the Tennessee Constitution.

Respectfully submitted,

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