

No. 17A1252

IN THE
Supreme Court of the United States

CHRISTOPHER HOSKINS,

Petitioner,

v.

PERRY FUCHS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE SECOND
DISTRICT OF TEXAS AT FORT WORTH

PETITION FOR A WRIT OF CERTIORARI

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Dated: September 20, 2018

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QUESTIONS PRESENTED

1. Whether the confidential complaint filed by Petitioner with the University of Texas at Arlington (UTA) Equal Opportunity Services (EOS) office is absolutely privileged and immune from civil action?
2. Whether the Majority prohibited Petitioner's constitutional right to petition by misapplying the TCPA's two-step process resulting in an Opinion that is the antithesis of the Texas legislature's express stated purpose for enacting it?
3. Whether the Majority erred in holding Petitioner negligent in filing the confidential UTA EOS complaint?

PARTIES TO THE PROCEEDINGS

1. CHRISTOPHER HOSKINS, Defendant and Petitioner.
2. PERRY FUCHS, Plaintiff and Respondent.

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PETITION FOR A WRIT OF CERTIORARI

Christopher Hoskins respectfully petitions for a writ of certiorari to review the decision of the Court of Appeals for the Second District of Texas at Fort Worth.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second District of Texas at Fort Worth, filed on December 22, 2016, is reported at 517 S.W.3d 834 (Tex. App.—Fort Worth 2016, pet. denied); Pet. App. 1a.

The order of the Supreme Court of Texas denying the petition for review was filed on February 16, 2018. Pet. App. 29a.

JURISDICTION

The Court of Appeals for the Second District of Texas at Fort Worth issued its opinion on December 22, 2016. Pet. App. 1a. Then, the Supreme Court of Texas denied the petition for review on February 16, 2018. Pet. App. 29a.

The Honorable Supreme Court Justice Alito extended the time within which to file a petition for a writ of certiorari to and including July 16, 2018. *See* No. 17A1252. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1253, 1257.

Although Petitioner had timely postmarked and mailed the forty petition copies on July 16, 2018, the appendix format did not comply with the rules of this Court and were returned with a letter dated July 24, 2018, detailing Rule 33.1(b). Moreover, the letter included a sixty-day extension under Rule 14.5, which effectively extended the time within which to file the petition to September 22, 2018. Petitioner

has made the required corrections in accordance with the rules of this Court and has made no changes to the substance of the petition. *See* No. 17A1252.

CONSTITUTIONAL PROVISIONS, STATUTES, AND POLICIES INVOLVED

First Amendment To The United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. I.

Texas Civil Practice & Remedies Code Chapter 27

§27.001

Definitions.

- (1) "Communication" includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.
- (2) "Exercise of the right of association" means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.
- (3) "Exercise of the right of free speech" means a communication made in connection with a matter of public concern.
- (4) "Exercise of the right to petition" means any of the following:
 - (A) a communication in or pertaining to:

- i. a judicial proceeding;
- ii. an official proceeding, other than a judicial proceeding, to administer the law;
- iii. an executive or other proceeding before a department of the state or federal government or a subdivision of the state or federal government;
- iv. a legislative proceeding, including a proceeding of a legislative committee;
- v. a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity;
- vi. a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue;
- vii. a proceeding of the governing body of any political subdivision of this state;
- viii. a report of or debate and statements made in a proceeding described by Subparagraph (iii), (iv), (v), (vi), or (vii); or
- ix. 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;

(B) a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(C) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, exec-

utive, judicial, or other governmental body or in another governmental or official proceeding;

(D) a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding; and

(E) any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.

(5) "Governmental proceeding" means a proceeding, other than a judicial proceeding, by an officer, official, or body of this state or a political subdivision of this state, including a board or commission, or by an officer, official, or body of the federal government.

(6) "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.

(7) "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.

(8) "Official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

(9) "Public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if the person has not yet qualified for office or assumed the person's duties:

- (A) an officer, employee, or agent of government;
- (B) a juror;
- (C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;
- (D) an attorney or notary public when participating in the performance of a governmental function; or
- (E) a person who is performing a governmental function under a claim of right but is not legally qualified to do so.

Tex. Civ. Prac. & Rem. Code § 27.001.

§ 27.002

Purpose.

The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

Tex. Civ. Prac. & Rem. Code § 27.002

§ 27.005(b)(1)-(3)

(b) Except as provided by Subsection (c), on the motion of a party under Section 27.003, a court shall dismiss a legal action against

the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of:

- (1) the right of free speech;
- (2) the right to petition; or
- (3) the right of association.

Tex. Civ. Prac. & Rem. Code § 27.005(b)(1)-(3).

§ 27.005(c)

(c) The court may not dismiss a legal action under this section 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.

Tex. Civ. Prac. & Rem. Code § 27.005(c).

§ 27.005(d)

(d) Notwithstanding the provisions of Subsection (c), the court shall dismiss a legal action against the moving party if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim.

Tex. Civ. Prac. & Rem. Code § 27.005(d).

§ 27.011

Construction.

- (a) This chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions.
- (b) This chapter shall be construed liberally to effectuate its purpose and intent fully.

Tex. Civ. Prac. & Rem. Code § 27.011.

**University of Texas at Arlington
Procedure 14-1**

https://www.uta.edu/provost/_downloads/new-faculty-orientation/human-resources/sexual-harassment-policy-2011.pdf.

Included in Appendix H.

**University of Texas at Arlington
Policy 5-511**

<https://www.uta.edu/policy/hop/5-511- UTA Policy 5-511: Consensual Relationships>.

Included in Appendix I.

STATEMENT OF THE CASE

A. Facts

The relationship started in the summer of 2007 when Hoskins met the woman who would become his best friend and love of his life. *See* Pet. App. 42a (¶ 4), 54a, 57a. As the years passed, they planned a life together agreeing on a wedding ceremony after Hoskins finished school with the hope of one day having children. *Id.* After more than seven years together, Hoskins's dream of raising a family with the woman he loved seemed all but certain but sadly it never came to be. Pet. App. 41a.

During an encounter in March of 2015, she became enraged and confessed to having an improper relationship with her graduate mentor, Respondent. Pet. App. 33a (¶ 4), 35a (¶ 2), 38a (¶ 4), 39a (¶ 3), 41a (¶ 2), 51a, 54a-58a. She boasted about her preferential treatment among the other graduate students and badgered Hoskins that there was nothing he could do about it then threatened that if he tried, Respondent would ruin his future career because he was the dean of a university and that

Hoskins was just a student and nothing in comparison. Pet. App. 33a-34a, 35a (¶ 2), 38a (¶ 4), 39a (¶ 3), 41a (¶ 2), 54a-58a. Hoskins was left speechless. Not only did the outburst mark the end of their seven-year relationship, it marked the end of a dream he had nurtured for years. And to add insult to injury, the house was full of family guests in town to watch Hoskins's younger brother walk for his high school graduation and several people heard the outburst. Pet. App. 33a, 35a, 37a, 39a, 41a, 54a-58a.

Hoskins was devastated and left utterly heartbroken. He suffered greatly following the confession. His sorrow was a direct result of the confession and was convinced that such a relationship between professor and student was inappropriate due to its propensity to cause damage to third parties, among other reasons. Pet. App. 41a-44a, 47a-58a.

Hoskins reviewed the University of Texas at Arlington's (UTA) policies, rules, and code of conduct and learned that such a relationship was in fact a violation. Due to the nature of a consensual relationship violation, the responsibility of preserving the honor and integrity of the University falls on individuals with knowledge of the improper relationship and/or third parties who have suffered as a result of one. After reviewing UTA's policies, Hoskins understood he had the legal, moral, and social duty to approach UTA's Equal Opportunity Services (EOS) office to convey the information that had been confessed to him. Pet. App 65a-82a; See Pet. App. 41a-44a, 47a-58a.

Hoskins followed the strict guidelines set forth by UTA and filed a confidential complaint with UTA's office of EOS with several sworn witness affidavits attached. Pet. App. 33a, 35a, 37a, 39a, 41a, 47a-58a. In the confidential complaint, Hoskins revealed his knowledge of Respondent's violation of UTA's Consensual Relationship Policy, explained how he received the information, admitted that he believed

it was true, and requested a reasonable investigation. Pet App 47a-58a.

In his meeting with the EOS office, Hoskins was ensured that the complaint was confidential and that UTA did not permit retaliation. Pet. App. 43a (¶ 9); See Pet. App. 74a, 80a.

The UTA EOS office conducted a formal investigation, concluded that there was not enough evidence to substantiate a penalty against Respondent, issued a formal finding in a Final Report, and then closed the matter without interviewing anyone who submitted affidavits. Pet. App. 59a-64a.

Respondent subsequently filed a civil defamation action against Hoskins based solely and entirely on the EOS complaint. Resp't[s] Compl. 153-280594-15, Aug. 25, 2015.

B. The District Court Proceedings

On August 25, 2015, Respondent filed suit against Petitioner for Defamation/Defamation Per Se for the statements made in the confidential UTA EOS complaint. *Id.* Respondent claimed that the confidential UTA EOS complaint was filed falsely and maliciously. *Id.* at (¶ 4.1). Respondent's retaliatory defamation action against Petitioner was based solely and entirely on the statements made in the confidential UTA EOS complaint, no other communication was plead. Resp't[s] Compl. 153-280594-15, Aug. 25, 2015.

In response, Petitioner filed an Original Answer and a Motion to Dismiss under Chapter 27 of the Texas Civil Practice & Remedies Code affirmatively asserting that the communication encompassed in the confidential UTA EOS complaint was a protected communication under the U.S. Constitution's First Amendment right to free speech and right to petition. Pet'r[s] Mot. to Dismiss 153-280594-15, Oct. 23, 2015.

On November 12, 2015, the 153rd District Court heard Petitioner's Motion To Dismiss and entered an Order denying the motion without stating the reasoning for the denial. Pet. App. 31a.

C. The Appellate Court Proceedings

On December 22, 2016, the Court of Appeals for the Second District of Texas at Fort Worth issued a published opinion, wherein a split 2-1 panel affirmed the denial of Petitioner's Motion to Dismiss. Pet. App. 1a.

The Majority held that Respondent established a *prima facie* case for each essential element of his defamation claim and the negligence standard applied because Respondent was a private figure despite his position as Interim Dean at UTA and previously conceding to be a public figure. *Id.* at 8a-16a.

The Honorable Justice Walker dissented, finding Petitioner's confidential UTA EOS complaint an absolutely privileged communication made in a quasi-judicial proceeding and that Respondent failed to establish a *prima facie* case for defamation because the communication was not actionable as a matter of law. Pet. App. 17a. Further, the Dissent explained that the Majority's interpretation of Petitioner's Motion to Dismiss under Chapter 27 of the Tex. Civ. Prac. & Rem. Code thwarts the Texas legislature's declared purpose for enacting it through the Texas Citizens Participation Act (TCPA) and would specifically render Section 27.011 a nullity, in conflict with its express, stated purpose. Pet. App. 25a-26a.

D. The Supreme Court of Texas Proceedings

On February 3, 2017, Petitioner filed a petition for review with the Supreme Court of Texas. The Court denied Petitioner's petition for review and did not issue a subsequent opinion. Pet. App. 29a.

REASONS FOR GRANTING THE PETITION**I.****Review Is Warranted Because The Communication Encompassed In The Confidential UTA EOS Complaint Is Absolutely Privileged And Immune From Civil Action.**

Absolute privilege is afforded to communications by the nature and reason of the facts upon which they are made ensuring no remedy exists in a civil action for defamation. *Reagan v. Guardian Life Ins. Co.*, 166 S.W.2d 909, 912 (Tex. 1942). In Texas, absolute privilege attaches to communications asserted in quasi-judicial proceedings. *Id.* Further, absolutely privileged communications cannot constitute the basis for a civil action. *Id.* at 912. When absolute privilege attaches to a communication, it effectively functions as an immunity and not a defense. *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 768 (Tex. 1987). In other words, absolute privilege is not a defense to a cause of action, but rather an immunity and not actionable. *CEDA Corp. v. City of Houston*, 817 S.W.2d 846 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

In *Overall*, the Honorable Justice Alito concluded that any communication made during the University of Pennsylvania's Employee Grievance procedure should be afforded full Constitutional protection because the communication was made in a quasi-judicial procedure. *Overall v. Univ. of Pennsylvania*, 412 F.3d 492 (3d Cir. 2005). In *Cuba*, the Fifth Circuit held that complaints filed with Southern Methodist University were communications made in a quasi-judicial proceeding. *Cuba v. Pylant*, 814 F.3d 701 (5th Cir. 2016). Both *Overall* and *Cuba* reasoned that complaints filed with universities fall within the protection of quasi-judicial proceedings. *Overall*, 412 F.3d 492; *Cuba*, 814 F.3d 701. Further, any statements, affidavits, and pleadings asserted in quasi-

judicial proceedings are absolutely privileged. *James v. Brown*, 637 S.W.2d 914 (Tex. 1982).

The Honorable Justice Walker's Dissent set out the two elements required for absolute privilege to attach: 1) the governmental entity must have the authority to investigate and decide the issue exercising its quasi-judicial power; and 2) the communication must relate to a pending or proposed quasi-judicial proceeding. *citing Perdue, Bracket, Flores, Utt & Burns v. Linebarger, Goggan Blair, Sampson & Meeks*, L.L.P., 291 S.W.3d 448, 452 (Tex. App.—Fort Worth, 2009); Pet. App. 18a-19a. Communications asserted or filed with a proper governmental entity with the authority to determine the issues raised in a quasi-judicial proceeding meet the two elements required and are absolutely privileged. *Shell Oil Co. v. Writt*, 464 S.W.3d 650, 655 (Tex. 2015).

In the present case, UTA exercises quasi-judicial power through a quasi-judicial proceeding in investigating and ruling on complaints filed through its office of EOS. Pet. App. 59a-64a, 65a-82a.

Analogous to *Overall* and *Cuba*, UTA is a university and a governmental entity possessing the authority and quasi-judicial power to investigate and decide the issue encompassed in the confidential complaint filed by Petitioner. UTA did in fact investigate and rule on the matter. Pet. App. 59a-64a.

Therefore, the communication encompassed in the confidential complaint is absolutely privileged and immune from Respondent's retaliatory civil action and since Respondent's action is based solely and entirely on Petitioner's confidential UTA EOS complaint, as a matter of law, it cannot constitute the basis of a defamation action.

The Honorable Justice Walker was on point in her analysis.

II.

Review Is Warranted Because The Majority Prohibited Petitioner's Constitutional Right To Petition By Misapplying The TCPA's Two-Step Process Resulting In An Opinion That Is The Antithesis Of The Texas Legislature's Express Stated Purpose For Enacting It Thereby Nullifying Petitioner's Constitutional Protection And Immunity.

This is Petitioner's flagship argument and is second only to demonstrate that should the Majority have recognized Petitioner's constitutional right to petition rather than prohibit it, the analysis would have lead to the finding of absolute privilege under a proper TCPA analysis.

The TCPA was codified under Chapter 27 of the Tex. Civ. Prac. & Rem Code and was enacted by the Texas legislature to, "encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." Tex. Civ. Prac. & Rem. Code §27.002; *In re Lipsky*, 460 S.W.3d 579 at 589 (Tex. 2015) ("The TCPA's purpose is to identify and summarily dispose of lawsuits designed only to chill First Amendment rights."). Moreover, Section 27.011 of the TCPA explains that, "this chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions" and that, "this chapter shall be construed liberally to effectuate its purpose and intent fully." Tex. Civ. Prac. & Rem. Code § 27.011(b).

In a motion to dismiss under the TCPA, courts must apply a two-step process. Tex. Civ. Prac. & Rem. Code §27.005; *Lipsky*, 460 S.W.3d at 586. In

the first step, the defendant movant must satisfy the initial burden to prove, by a preponderance of the evidence, that the legal action is based on, relates to, or in response to the party's exercise of 1) the right to free speech; 2) the right to petition; or 3) the right of association. Tex. Civ. Prac. & Rem. Code § 27.005(b)(1)-(3).

In the second step, the burden shifts to the plaintiff to establish by clear and specific evidence a *prima facie* case for each essential element of the claim in question. Tex. Civ. Prac. Rem. Code § 27.005(c); *Lipsky*, 460 S.W.3d at 587.

Strangely, the Majority began their application of the two-step process on step-two instead of step-one and after holding that Respondent had satisfied his burden to establish a *prima facie* case for his defamation action, refused to analyze step-one all together effectively stripping Petitioner's chance to establish that his communication encompassed in the complaint was protected under the U.S. Constitution, absolutely privileged, and immune from the civil action. Pet. App. 7a, 14a-16a.

Despite absolute privilege functioning as an immunity and not a defense, the Majority reasoned that Petitioner did not discuss the applicability of Section 27.005(d) until his reply brief and may not be asserted in a party's brief on the merits. *Hoskins v. Fuchs*, 517 S.W.3d 834, 844 n.8; Pet. App. 15a n.8. However, Petitioner did plead the defenses of the U.S. Constitution's First Amendment right to free speech and right to petition yet was prohibited from establishing the exercise of those rights for a proper analysis. *Id.*; Pet'r[s] Mot. to Dismiss ¶¶ 12-22, Oct. 23, 2015.; Pet'r[s] Answer ¶ 15.

If the Majority had at least analyzed Petitioner's communication encompassed in the confidential UTA EOS complaint under step-one of the TCPA, it would have been readily apparent that Petitioner was exercising his constitutional right to petition, that

absolute privilege had attached to the communication, and was immune from civil action.

Nevertheless, Section 27.005(d) explains, "Notwithstanding the provisions of Subsection (c), the court shall dismiss a legal action against the moving party if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim." Tex. Civ. Prac. & Rem. Code § 27.005(d). However, absolute privilege is not a defense but an immunity to civil action thus not actionable as a matter of law. *Reagan*, 166 S.W.2d at 912; *Hurlbut*, 749 S.W.2d 762, 768; *CEDA Corp.*, 817 S.W.2d 846, 849. Absolute privilege does not fit within the confines of Section 27.005(d). Moreover, Section 27.011 explains,

- (a) This chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions.
- (b) This chapter shall be construed liberally to effectuate its purpose and intent fully.

Tex. Civ. Prac. & Rem. Code § 27.011.

The Majority effectuated the exact opposite of Section 27.011 by refusing to analyze Petitioner's communication for *any* possible defenses and immunities prohibiting his constitutional rights. Pet. App. 1a-16a.

The Majority also reasoned that Respondent did not have to establish the element of malice because he was a private figure. Pet. App. 9a-12a. Even though Respondent had previously conceded that he was a public figure in the Trial Court. *Id.* at 10a. So, the Majority refused Petitioner of any analysis to establish that his communication was protected under the U.S. Constitution and absolutely privileged, then went on to lower Respondent's

malice requirement to negligence even though Respondent had already conceded he was a public figure in the lower court. Pet. App. 9a-16a. Petitioner does not understand how the Majority's reasoning could have afforded Respondent every concession possible, yet prohibited Petitioner his constitutional right to petition under his own motion to dismiss.

If the Majority had started the TCPA's two-step process on step-one, they would have at least recognized Petitioner's constitutional right to petition which would have lead to the finding of absolutely privilege having been asserted in a quasi-judicial proceeding. If the Majority had done so, Petitioner is absolutely certain that the Majority Opinion would have mirrored the reasoning set out in the Honorable Justice Walker's Dissent and would have reversed and remanded.

The Honorable Justice Walker began her TCPA analysis just as it specifies, on step-one. Pet. App. 23a; Tex. Civ. Prac. & Rem. Code § 27.005(b). In her Dissent, she explained, "The pleadings, affidavits, and evidence, establish that Hoskins's allegedly defamatory communication—which was made in the handwritten form EOS complaint that he completed and filed with UTA—was a communication expressly falling within the TCPA's definition of the right to petition." Pet. App. 23a. The Dissent also explained,

The pleadings, controverting affidavits, and evidence established that Fuchs's defamation action against Hoskins is based on Hoskins's exercise of his right to petition. *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.001(4)(A)(vi), (B), (C) (West 2015) (defining right to petition as including, respectively a communication pertaining to a proceeding before a managing board of an educational institution supported by public revenue, a communication in connection with an issue under consideration by a

governmental body in an official proceeding, a communication encouraging review of an issue by a governmental body in an official proceeding.); § 27.001(8) (defining official proceeding as including any type of administrative proceeding conducted before a public servant).

Pet. App. 22a.

After finding that Petitioner's communication was absolutely privileged and had met by a preponderance of the evidence that the action was based on, related to or in response to Petitioner's constitutional right to petition, the analysis went on to step-two. Pet. App. 23a; See Tex. Civ. Prac. & Rem. Code § 27.005(c).

In step-two, the burden shifted to Respondent to establish by clear and specific evidence a *prima facie* case for each essential element of his defamation action against Petitioner. Pet. App. 23a. The Dissent reasoned that Respondent could not recover on his defamation claim because the communication encompassed in the EOS complaint is absolutely privileged and not actionable as a matter of law. *Id.*

The Honorable Justice Walker went on to reveal the true nature of Respondent's action against Petitioner, "Fuchs's defamation lawsuit serves only to chill the First Amendment right to petition." Pet. App. 25a. Perhaps most importantly, the Dissent explained,

An interpretation of the TCPA that would uphold the denial of a dismissal motion when the alleged defamatory communication is inactionable as a matter of law would thwart the legislature's declared purpose for enacting the TCPA and would render section 27.011—providing that the TCPA does not lessen any immunity available at common law—a nullity.

Pet. App. 25a-26a.

Further, “The legislature could not have intended such a result, especially given the express, stated purpose of the TCPA.” *Id.*

Petitioner firmly believes that should the Majority not have prohibited his First Amendment right to petition, the Majority Opinion would have been unanimous and would have mirrored the reasoning set out in the Honorable Justice Walker’s Dissent.

III.

Review Is Warranted Because The Majority Erred In Holding Petitioner Negligent In Filing The Confidential UTA EOS Complaint.

Assuming arguendo that Respondent is a private figure (it is a matter of law after all), the pleadings, controverting affidavits, and evidence establish that Petitioner’s confidential UTA EOS complaint was not negligent, but reasonable, valid, and commenced in good faith.

Petitioner took the best course of action possible in the complicated position he was placed in by his ex-girlfriend. After UTA EOS had completed their investigation, EOS informed Respondent that Petitioner’s ex-girlfriend had in fact recanted her prior statements during questioning by EOS. Pet. App. 46a; Pet’r[s] Mot. to Dismiss ¶ 7; Pet’r[s] Answer ¶¶ 8, 10; Resp’t[s] Compl. ¶4.2.

Petitioner is shocked that UTA has allowed the retaliatory civil action against him from the very subject of the investigation with no recourse for several reasons: UTA Policy expressly states that retaliation would be prohibited (Pet. App. 74a, 80a; *See* Pet. App. 43a (¶ 9)), the validity of the confidential complaint is clear on its face having been supported by no less than four sworn witness affidavits (Pet. App. 33a, 35a, 37a, 39a.), and most importantly, through its own investigation, UTA

EOS had in fact deduced that Petitioner's confidential complaint had merit after questioning Petitioner's ex-girlfriend regarding the allegations during which she recanted her prior statements. Pet. App. 46a; Pet'r[s] Mot. to Dismiss ¶ 7; Pet'r[s] Answer ¶¶ 8, 10; Resp't[s] Compl. ¶ 4.2.

In other words, she formally withdrew the statements specified in Petitioner's confidential complaint. *Id.* UTA EOS had proven that the statements made by Petitioner's ex-girlfriend to Petitioner, described in the complaint, had in fact been made. *Id.*

Interestingly, UTA EOS concluded their investigation without contacting a single one of the individuals who provided sworn witness affidavits despite UTA Procedure 14-1 specifying, "Any persons thought to have information relevant to the complaint shall be interviewed, and such interviews shall be appropriately documented." Pet. App. 70a; *See* Pet. App. 59a-64a.

Nevertheless, despite the validity of Petitioner's reasonable and good faith actions, the Majority held that Petitioner was negligent in filing the confidential UTA EOS complaint because there was no evidence that Petitioner investigated the statements made by his ex-girlfriend. Pet. App. 13a. With the utmost respect to the Second Court of Appeals, this is erroneous. After sustaining multiple significant threats, the facts clearly indicate that Petitioner's future was at serious risk if he made a single misstep in conveying his ex-girlfriend's confession to anyone lacking the authority to hear it. Petitioner considered the safest and most prudent course of action for a month, researching UTA policy, rules, and procedures. After discovering UTA's office of EOS was specifically designed to confidentially hear and investigate the exact kind of claims made by his ex-girlfriend, Petitioner concluded that confidentially approaching UTA EOS was the only option he had to

fully protect himself and requested a reasonable investigation. *See Pet. App. 41a-44a, 51a-58a, 65a-82a.*

Petitioner did not take to Twitter, Facebook, or any other public forum to express his grievances, but rather confidentially approached the exact governing body designed to hear such complaints with the hopes of protecting himself while requesting a reasonable investigation to preserve the integrity of his alma mater UTA and prevent further collateral damage to principals and/or third parties involved with the UTA Consensual Relationship Policy violation. *See Id.*

Petitioner had hoped for a face-to-face meeting with Respondent with the protection of UTA EOS supervising. However, Respondent did not have such integrity, instead Respondent filed a frivolous and malicious retaliatory lawsuit intent on Petitioner's ruination thus initiating the very threats that Petitioner's ex-girlfriend had made during her outburst. Resp't[s] Compl. 153-280594-15, Aug. 25, 2015.

Petitioner's course of action should be considered the template for how to handle such a situation. If a person ever finds themselves in the same or similar circumstances as Petitioner, the correct course of action is not to go on a public tirade, but rather to confidentially approach the proper governing body designed to hear, investigate, and rule on the matter at issue.

For the reasons stated above, the Majority erred in holding Petitioner negligent in filing the confidential UTA EOS complaint.

CONCLUSION

The petition for a writ of certiorari should be granted because the Majority prohibited Petitioner from asserting his constitutional right to petition by

misapplying the TCPA's two-step process thereby precluding him an opportunity to establish his communication was protected under the U.S. Constitution thereby effectively stripping his First Amendment right to petition.

Moreover, the petition should be granted because Petitioner's communication was confidentially submitted to UTA's office of EOS, the exact governing body with quasi-judicial power designed to hear, investigate, and decide the merits of Consensual Relationship violation allegations through a quasi-judicial procedure, thus attaching absolute privilege to the communication encompassed in Petitioner's confidential UTA EOS complaint making it immune from Respondent's retaliatory civil action.

Since the commencement of the UTA EOS investigation and continuing over a series of briefs, Respondent has successfully muddied the waters and created a convoluted mess applying a variety of new arguments in each subsequent brief in an effort to blur the lines regarding the maliciousness of his retaliatory civil action against Petitioner. Starting with the claim that Petitioner had been abusive and continued to harass his ex-girlfriend. However, no abuse or harassment has *ever* taken place on behalf of Petitioner. Petitioner absolutely refutes such baseless claims. Clearly, Respondent's conference with Petitioner's ex-girlfriend, during UTA EOS's investigation, was designed to create a story for why she made the statements and to create an offensive rhetoric against Petitioner to divert focus from Respondent's own reprehensible actions to Petitioner's character and integrity. *See Pet'r[s] Answer ¶ 8).*

Petitioner's ex-girlfriend is a principal in the Consensual Relationship violation and it baffles Petitioner that her statements were given such deference when she recanted her prior statements described in Petitioner's complaint officially with-

drawing them, thus confirming that the event described in the confidential complaint occurred as described. The record indicates that the only person responsible for abusive behavior is Petitioner's ex-girlfriend.

The Honorable Justice Walker saw right through this and reasoned that Respondent's civil action was retaliatory and designed to chill Petitioner's First Amendment right to petition.

Although Chapter 27 of the Texas Civil Practice & Remedies Code is partially substantive of federal law by implicating the protections of the U.S. Constitution, it is mostly procedural. Petitioner does not seek this Court's review to rule in the place of a state court's judgment based on a state statute, such a request would be unreasonable, but rather to issue an order vacating the Second Court of Appeals's judgment and remand for a new proceeding that recognizes Petitioner's constitutional right to petition in a proper analysis under Chapter 27 of the Texas Civil Practice & Remedies Code. With the utmost respect, Petitioner humbly requests the Supreme Court of The United States to reinstate the constitutional rights that were prohibited by the Second Court of Appeals.

The fact of the matter is Respondent's retaliatory civil action is frivolous, malicious, and designed to chill Petitioner's constitutional right to petition through intimidation. Yet, Petitioner refuses to back down and be intimidated even with his back squarely up against the ropes. Petitioner has gathered all of his strength, all of his love, all of his power, everything he has left to file this petition and now proudly stands alone in defiance of Respondent's meritless cause of action and immeasurable power and influence.

Even though Petitioner has taken a beating from pillar to post throughout this process, he is eager to face his adversary in the final round. In the

immortal words of the great Yogi Berra, it aint over till its over.

Respectfully submitted,

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