

**COURT OF APPEALS OF TENNESSEE
AT NASHVILLE**

TREVOR SETH ADAMSON,)

Plaintiff-Appellant,)

v.)

No. M2020-01651-COA-R3-CV

SARAH E. GROVE,)

DEBORAH ANN SANGETTI,)

and KARL S. BOLTON,)

Defendants-Appellees.)

**ON APPEAL FROM THE JUDGMENT OF THE SUMNER
COUNTY CIRCUIT COURT**

BRIEF OF THE STATE OF TENNESSEE

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ISSUES PRESENTED FOR REVIEW

1. Whether Plaintiff has waived its challenge to the constitutionality of the Tennessee Public Participation Act, Tenn. Code Ann. §§ 20-17-101 to -110, by not raising the issue in the trial court.
2. If the challenge is not waived, whether the Tennessee Public Participation Act comports with the constitutional right to a jury trial and with the separation of powers. (Plaintiff's Issues 1 and 2.)¹

STATEMENT OF THE CASE AND RELEVANT FACTS

Plaintiff, Trevor Seth Adamson, who is a resident of Sumner County, is one of the administrators of Tennessee Activities Coalition ("T.A.C."), a grass-roots organization. (TR Vol. 1 at 5,7.) In that role, Plaintiff helped organize a rally to be held in Nashville on May 28, 2020. (*Id.* at 7.) Before that event, Defendants, Sarah Grove, Deborah Ann Sangetti, and Karl Bolton, posted allegedly false statements on social media concerning Plaintiff's and T.A.C.'s involvement with the rally, as well as allegedly defamatory comments regarding Plaintiff's professional and personal life. (*Id.* at 7-13.)

Plaintiff filed suit against Defendants on July 8, 2020. (*Id.* at 14-21.) He asserted multiple causes of action, including invasion of privacy, libel, slander, intentional interference with current and prospective business relations, civil conspiracy to defame, and intentional infliction

¹ The State of Tennessee submits this brief pursuant to Tenn. R. App. P. 32(c). Accordingly, the State takes no position on Plaintiff's other issues.

of emotional distress. (*Id.*) Plaintiff sought compensatory and punitive damages, as well as injunctive relief requiring the Defendants to retract their statements on social media and restraining the Defendants from posting on social media concerning any events pertaining to Plaintiff's private life. (*Id.*)

Shortly thereafter, Plaintiff filed a Notice of Voluntary Dismissal under Tenn. R. Civ. P. 41.01, and the court entered an Order of Dismissal on August 24, 2020. (*Id.* at 116-119.)²

Defendants filed, on September 11, 2020, a combined Motion to Alter or Amend the Order of Dismissal and Petition to Dismiss with Prejudice under the Tennessee Public Participation Act, Tenn. Code Ann. §§ 20-17-101 to -110 ("TPPA"). (TR Vol. II at 120-276.) Defendants asserted that they had a "vested statutory right to a dismissal [of the amended complaint] with prejudice under the Tennessee Public Participation Act" and, therefore, the "Court's order of dismissal should be altered or amended accordingly." (*Id.* at 120-161.) Defendants also sought an award of costs and attorney's fees, as well as sanctions under Tenn. Code Ann. § 20-17-107. (*Id.* at 210-223.)

Plaintiff, acting *pro se*, filed a "Verified Petition of Trevor Adamson and Samantha Myers to Dismiss" on September 29, 2020. (TR Vol. III at 277-286.) This document was intended by Plaintiff, and treated by both

² Plaintiff's counsel had filed a motion to withdraw as counsel on August 13, 2020. (*Id.* at 111-113). But counsel filed the Notice of Voluntary Dismissal on Plaintiff's behalf. The motion to withdraw was not granted until October 5, 2020. (TR Vol. IV at 428-29.)

Defendants and the court, as a response to Defendants' TPPA Petition to Dismiss. (TR Vol. 1 at 1-3.)³

After a hearing on October 5, 2020, the trial court issued its Final Order on November 17, 2020, granting Defendants' Motion to Alter or Amend and TPPA Petition to Dismiss, awarding Defendants \$15,000 in attorney's fees, and imposing \$24,000 in sanctions against the Plaintiff. (TR Vol. V at 620-22.) Plaintiff timely filed a notice of appeal. (TR Vol. VI at 648-49.)

STATUTES INVOLVED

The Tennessee Public Participation Act, Tenn. Code Ann. §§ 20-17-101 to -110, is an “anti-SLAPP” (strategic lawsuits against public participation) statute that “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. 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).

³ See TR Vol. III at 413 (“Defendants . . . file the instant reply to what appears to have been intended as the Plaintiff's *pro se* Response” to Defendants' TPPA Petition to Dismiss) and TR Vol. 1 at 1 (“Plaintiff having indicated to the Court that the Plaintiff's September 29, 2020 filing in Sumner County Case No. 83CC1-2020-CV-906) was intend to serve as his Response to the Defendants' [TPPA Petition to Dismiss]. . . the Court shall treat it as a Response”)

In ruling on such a petition, the court engages in a two-prong analysis. Under the first prong, the 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.” Tenn. Code Ann. § 20-17-105(a). If this burden is met, then the court must determine under the second prong whether the responding party has established “a prima facie case for each essential element of the claim in 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.*

ARGUMENT

In this appeal from the trial court’s order granting Defendants’ TPPA petition, Plaintiff challenges the constitutionality of the TPPA. But Plaintiff has waived his challenge by failing to raise it in the trial court. In any event, the constitutional challenge to the TPPA is without merit.

I. Plaintiff Has Waived Any Claim That the TPPA is Unconstitutional.

It “is well settled that matters not raised at the trial court level are considered waived on appeal.” *Eagles Landing Dev., LLC v. Eagles Landing Apartments, LP*, 386 S.W.3d 246, 254 (Tenn. Ct. App. 2012) (citing *Waters v. Farr*, 291 S.W.3d 873, 913 (Tenn. 2009)). Accordingly, issues that were not raised in the trial court cannot be raised for the first

time on appeal. *Powell v. Cmty. Health Sys., Inc.*, 312 S.W.3d 496, 511 (Tenn. 2010).

This waiver rule extends to constitutional challenges to a statute's validity.⁴ See *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983) (declining to address constitutional challenge that was never raised in trial proceedings); *In re Adoption of E.N.R.*, 42 S.W.3d 26, 32 (Tenn. 2001) (finding that because issue regarding constitutionality of a statute was not properly raised in the trial court, “it has effectively been waived for full consideration on appeal”). The rule is based on the principle that appellate courts in Tennessee do not decide issues that were not first decided by the trial court. Appellate courts review and adjudicate issues that were presented and decided in the trial courts. *Dorrier v. Dark*, 537 S.W.2d 888, 890 (Tenn. 1976); *In re Estate of Boykin*, 295 S.W.3d 632, 636 (Tenn. Ct. App. 2008). Indeed, even though an issue may have been raised at the trial-court level, this Court will often not address it if the trial court did not consider and rule on it. See *Fitzgerald v. Hickman Cty. Gov’t*, No. M2017-00565-COA-R3-CV, 2018 Tenn. App. LEXIS 174, at *39-40 (Tenn. Ct. App. Apr. 4, 2018).

Plaintiff never raised his constitutional challenge to the TPPA in either of the two (ultimately consolidated) cases below: Case No. 83CC1-2020-CV-616 or Case No. 83CC1-2020-CV-906. Consequently, Plaintiff

⁴ A recognized exception to the waiver rule may apply when the statute being challenged “is so obviously unconstitutional on its face as to obviate the necessity for any discussion.” *Lawrence*, 655 S.W.2d at 929. For the reasons discussed below, that exception does not apply here; the TPPA is not “obviously unconstitutional.”

has waived the issue; he may not raise it for the first time in this Court. *See Metro. Gov't of Nashville & Davidson Cnty. v. Layton Jones*, No. M2020-00248-COA-R3-CV, 2021 WL 1590236, at *2 (Tenn. Ct. App. Apr. 23, 2021).

II. The TPPA Is Constitutional.

Even if Plaintiff had not waived his constitutional claims regarding the TPPA, they would still fail on the merits. Plaintiff argues that the TPPA is unconstitutional because it denies parties the right to a jury trial and it conflicts with the Tennessee Rules of Civil Procedure.⁵ Neither argument avails; the TPPA comports with the right to a jury trial and with the separation of powers.

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); *see also Fisher v. Hargett*, 604 S.W.3d 381, 397 (Tenn. 2020). 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*,

⁵ Plaintiff also argues that the TPPA is unconstitutional because it deprives parties of due process. (Br. Plaintiff-Appellant, 21, 35.) However, this issue was not included in Plaintiff’s statement of issues, as required by Tenn. R. App. P. 27. (Br. Plaintiff-Appellant, 14.) It is therefore not properly before the Court. *See Hodge v. Craig*, 382 S.W.3d 325, 335 (Tenn. 2012) (citing *Bunch v. Bunch*, 281 S.W.3d 406, 410 (Tenn. Ct. App. 2008)).

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).

A. The TPPA does not violate the right to a jury trial.

Article I, section 6, of the Tennessee Constitution mandates that “the right of trial by jury shall remain inviolate.”⁶ The Tennessee Supreme Court has long recognized that while this constitutional provision is broad it does not guarantee the right to a jury trial in every case. Rather, it guarantees the right to trial by jury as it existed at common law under the laws and constitution of North Carolina at the time of the adoption of the Tennessee Constitution of 1796. *McClay v. Airport Management Services, LLC*, 596 S.W.3d 686, 690 (Tenn. 2020) (citing *Young v. City of LaFollette*, 479 S.W.3d 785, 793 (Tenn. 2015)); *Helms v. Tenn. Dep’t of Safety*, 987 S.W.2d 545, 547 (Tenn. 1999).

The Supreme Court has also recognized that it is within the General Assembly’s authority to legislatively alter the common law. *See, e.g., Heirs of Ellis v. Estate of Ellis*, 71 S.W.3d 705, 712 (Tenn. 2002) (stating that “the General Assembly unquestionably has the

⁶ Plaintiff also cites to the Seventh Amendment to the federal constitution. Brief of Appellant at 21. But the Seventh Amendment does not apply to the states. *See Newport Housing Authority v. Ballard*, 839 S.W.2d 86, 89 (Tenn. 1992).

constitutional and legislative authority to change the common law of this state.”) Additionally, the constitutional right to trial by jury does not apply to statutory rights and remedies created after the adoption of the 1796 Constitution. *Helms*, 987 S.W.2d at 547. Instead, the General Assembly is free to either dispense with the right or provide the right of trial by jury. *Young v. City of LaFollette*, 479 S.W.3d at 793-94 (citations omitted). Finally, the right to a jury trial guarantees only that all contested *factual* issues will be decided by jurors who are unbiased and impartial. *State v. Smith* 418 S.W.3d 38, 45 (Tenn. 2013).

For his argument that the TPPA violates the constitutional right to a jury trial Plaintiff relies solely on cases from other jurisdictions, namely, decisions of the Minnesota and Washington Supreme Courts finding their respective anti-SLAPP statutes unconstitutional. *See Davis v. Cox*, 351 P.3d 862 (Wash. 2015); *Leiendecker v. Asian Women United of Minnesota*, 895 N.W.2d 623 (Minn. 2017).

Plaintiff’s reliance on these cases is misplaced. Both the Minnesota and Washington statutes impose a higher burden on the responding plaintiff. Each statute required the plaintiff to prove a probability of prevailing on his claim against the defendant by “clear and convincing evidence”—a standard that both courts found “invades the jury’s essential role of deciding debatable questions of fact.” *Davis*, 351 P.3d at 874-75; *see also Leiendecker*, 895 N.W.2d at 636.

The TPPA contains no such standard; it requires a plaintiff to demonstrate only “a prima facie case for each essential element of the claim the legal action.” Tenn. Code Ann. § 20-17-105(b). This prima facie standard does not require the trial court to make any findings of fact; it

simply requires the court to decide whether the plaintiff met his or her burden of production to show that a reasonable trier of fact could find in favor of the plaintiff. If the plaintiff meets this burden, the case can proceed to a jury trial on the underlying claims. Only if the plaintiff fails to meet this prima facie burden would the court dismiss the case.

Put another way, the court would be dismissing the case only because it would be subject to dismissal anyway, under, for example, a motion to dismiss for failure to state a claim or a motion for directed verdict. And the Tennessee Supreme Court has long recognized that a trial court's authority to withdraw a case from the jury—whether by directing a verdict, dismissing for failure to state a claim, or enforcing a compulsory nonsuit—does not violate the right to a jury trial contained in article I, section 6, of the Tennessee Constitution. *See Hopkins v. Nashville, C & St. L. R. R.*, 34 S.W. 1029, 1036 (Tenn. 1896) (noting that “[i]f all the facts claimed to be proved by the evidence of the plaintiff cannot, if true, make a prima facie case for him, it would be worse than idle to proceed further with the trial”). By requiring only that the plaintiff make out a prima facie case, the TPPA does not violate a plaintiff's right to a trial by jury.

This conclusion finds support from decisions in *other* States that are not Washington or Minnesota. In *Taylor v. Colon*, 482 P.3d 1212 (Nev. 2020), for instance, the Nevada Supreme Court held that Nevada's anti-SLAPP's requirement that plaintiff demonstrate “with prima facie evidence a probability of prevailing on the claim” does not violate the constitutional right to a jury trial. 482 P.3d at 1216. *See also Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1236 (D.C. 2016) (concluding that

anti-SLAPP statutes in Washington, D.C., do not violate plaintiff's constitutional right to a jury trial where dismissal requires determining that plaintiff could not succeed as a matter of law); *Handy v. Lane Cty.*, 385 P.3d 1016, 1024-26 (Or. 2015) (to avoid constitutional infirmity, interpreting Oregon's anti-SLAPP statutes to require only that plaintiff submit sufficient evidence from which a reasonable trier of fact could find that a plaintiff met his or her burden of production); *Briggs v. Eden Council for Hope & Opportunity*, 969 P.3d 564, 574-75 (Cal. 1999) (implying that California's anti-SLAPP statutes do not violate the right to a jury trial because they require court to determine only whether the plaintiff has stated and substantiated a legally sufficient claim); *Gifford v. Taunton Press, Inc.*, No. DBDCV186028897S, 2019 WL 3526461, at *6 (Sup. Ct. Conn. July 11, 2019) (finding that Connecticut's anti-SLAPP statutes do not violate constitutional right to jury trial because they require plaintiff only "to demonstrate that there is probable cause to believe he will prevail because his claims have merit"); *cf. Landry's, Inc. v. Animal Legal Def. Fund*, 566 S.W.3d 41, 67 (Tex. App. 2018) (determining that a movant's burden to establish a valid defense by a preponderance of the evidence under Texas' anti-SLAPP statutes does not violate a plaintiff's right to a jury trial).

B. The TPPA does not violate the separation of powers.

Plaintiff also makes a separation-of-powers argument, contending that the TPPA infringes on the power of the judicial branch to promulgate rules governing the practice and procedure of the courts because it directly contradicts Rules 33 and 34 of the Tennessee Rules of Civil

Procedure. Brief of Appellant at 23-24. This argument, too, is unavailing.

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 necessarily 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 45, 47 (Tenn. 1975). 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. The Court

has accordingly held that the “General Assembly oversteps constitutional boundaries in violation of the separation of powers when it exercises its legislative power in a way that directly contradicts existing procedural rules of the courts.” *McClay*, 596 S.W.3d at 694 (citing *State v. Lowe*, 552 S.W.3d 842, 857 (Tenn. 2018)).

1. The TPPA is a substantive and remedial law.

Statutes enacted by the General Assembly that are substantive or remedial in nature normally do not infringe on the powers of the judiciary. *See, e.g., State v. 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). The first step in addressing a separation-of-powers challenge to a statute is therefore to determine whether the statute is predominantly substantive or procedural in nature. *Willeford v. Klepper*, 597 S.W.3d 454, 466 (Tenn. 2020) (holding that a “substantive versus procedural analysis is appropriate for the analysis of issues of constitutionality under the separation of powers provisions of the Tennessee Constitution”).

A substantive law is defined 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). Procedural laws, by contrast, 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”).

The TPPA is a substantive and remedial law. Tennessee’s first anti-SLAPP statute, the Tennessee Anti-SLAPP Act of 1997, codified at Tenn. Code Ann. §§ 4-21-1001 to -1004, merely provided immunity from liability to “individuals who make good faith reports of wrongdoing to appropriate governmental bodies.” Tenn. Code Ann. §§ 4-21-1002(a), 1003(a). In enacting the TPPA in 2019, however, the General Assembly expressly “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 remedy provided by the TPPA was deemed “necessary to implement the rights protected by [the] Constitution of Tennessee, Article I, §§ 19 and 23, as well as by the First Amendment to the United States Constitution,” and the legislature directed that it “shall be construed broadly to effectuate its purposes and intent.” Tenn. Code Ann. § 20-17-102.

Indeed, the TPPA is a significantly broader “additional substantive remedy,” as it applies to *any* person against whom a legal action is filed in response to that person’s “exercise of the right of free speech, right to petition, or right of association.” Tenn. Code Ann. § 20-17-104(a). The “exercise of free speech” and “exercise of the right to petition” are broadly defined and include more than reports of wrongdoing to governmental bodies. *See* Tenn. Code Ann. §§ 20-17-103(3), (4) and (6). And the TPPA expands the scope of remedies available to include not only dismissal of the legal action but a stay of discovery while a petition to dismiss is

pending, an award of costs and attorney’s fees upon dismissal, and “[a]ny additional relief, including sanctions, that the court determines necessary to deter repetition of the conduct by the party who brought the legal action or by others similarly situated.” Tenn. Code Ann. §§ 20-17-104(d), 107(a)(1)-(2).

In short, the TPPA provides remedies for the redress of wrongs inflicted by violation of a person’s constitutional rights. And “[i]t 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; *see also McClay v. Airport Management Services, LLC*, 596 S.W.3d 686, 695 (Tenn. 2020) (holding that the “statutory cap on noneconomic damages is a substantive change in the law that was within the General Assembly’s legislative authority to enact” and the cap “does not interfere with the judicial power of the courts to interpret and apply law”). Accordingly, the TPPA does not violate the separation of powers doctrine as established by article II, section 2, of the Tennessee Constitution.

2. The TPPA does not conflict with the Rules of Civil Procedure.

Plaintiff argues that the TPPA directly conflicts with Rules 33 and 34 of the Tennessee Rules of Civil Procedure. But even if the TPPA were a procedural measure rather than a substantive, remedial law, it would not violate separation of powers principles because it does not conflict with the Rules of Civil Procedure. The 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. Indeed, there are several 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).⁷ And there are numerous examples of Tennessee appellate courts upholding procedural statutes 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*, No. W2012-01230-COA-R9-CV, 2013 WL 1645713, at *9 (Tenn. Ct. App. Apr. 17, 2013) (finding that pre-notice requirement of the Health Care Liability Act did not conflict with Court’s procedural rules).

The Tennessee Supreme Court will consent to the legislature’s procedural or evidentiary rules when the statutes “(1) are reasonable and workable within the framework already adopted by the judiciary, and (2) work to supplement the rules already promulgated by the Supreme Court.” *Mallard*, 40 S.W.3d at 481. The TPPA satisfies both of these

⁷ The legislature approves the rules promulgated by the Tennessee Supreme Court, including the Rules of Civil Procedure. *See* Tenn. Code Ann. § 16-3-404.

criteria. 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, the Supreme Court “will generally defer to the judgment of the legislature.” *Biscan v. Brown*, 160 S.W.3d 462, 474 (Tenn. 2005).

a. The TPPA is reasonable and workable within the judicial framework and supplements the rules of the judiciary.

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. As discussed, the trial court still must determine whether the petitioning party has made a prima facie case that the legal action 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). 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 statutory definitions. *Id.*; see Tenn. Code Ann. § 20-17-103.

The trial must also determine, under § 20-17-105(b), whether the responding party has established a prima face case for each essential element of the claim, and then, under § 20-17-105(c), whether the defendant has established a valid defense. None of these provisions remove from the trial court its authority to interpret and apply the law; indeed, the TPPA specifically provides 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).

Contrary to Plaintiff’s assertions (Br. Plaintiff-Appellant, 23-24), the TPPA does not directly contradict Rules 33 and 34 of the Rules of Civil Procedure by completely foreclosing any opportunity for discovery. A trial court may still exercise its discretion to allow discovery relevant to the petition upon a showing of good cause. *See* Tenn. Code Ann. § 20-17-104(d); *cf. Luker v. Luker*, 578 S.W.3d 450, 461 (Tenn. Ct. App. 2018) (holding that under Domestic Abuse Act trial court may exercise its discretion to determine what discovery to allow while *ex parte* order of protection is in effect).

Finally, by providing for dismissal of an action brought for an improper purpose, i.e., in response to a party’s exercise of its constitutional rights, Tenn. Code Ann. § 20-17-104(a), the TPPA effectuates the overarching objective the Rules of Civil Procedure: “to secure the just, speedy and inexpensive determination of every action.” Tenn. R. Civ. P. 1. *Cf. Webb v. Roberson*, 2013 WL 1645713, at *9 (finding that the purpose of the notice requirements of the Health Care Liability Act is to “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”); *see also Davis v. Parks*, 130 Nev. 1169, at *2 (Nev. 2014) (finding that Nevada’s anti-SLAPP statutes do not violate the separation 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”).

b. Deference to the legislature’s enactment of the TPPA is appropriate.

The TPPA should also be upheld against a separation-of-powers challenge because it represents an exercise of the legislature’s authority to determine public policy. “Questions 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); *see also McClay v. Airport Management Services, LLC*, 596 S.W.3d at 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). 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), in part because it represented a “constitutional declaration of the public policy of this state with regard to contingency attorney fee contracts in medical malpractice cases.” *Id.* at 112. This Court, too, has upheld the constitutionality of statutes enacted on the basis of substantive public-policy objectives. See *Webb v. Roberson*, 2013 WL 1645713, at *9 (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); *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). In *Webb*, this Court 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:

The purpose of this chapter 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. *See Competitive Enter. Inst. v. Mann*, 150 A.3d at 1231 (concluding that denial of motion to dismiss under anti-SLAPP law implicates a “substantial public interest” because purpose of motion is to protect a “particular value of a high order”—the right to free speech guaranteed by the First Amendment—by shielding defendants from meritless litigation that might chill advocacy on issues of public interest); *Lefebvre v. Lefebvre*, 199 Cal. App. 4th at 702 (“The Legislature enacted the anti-SLAPP statute to address the societal ills caused by meritless lawsuits that are filed to chill the . . . exercise of First Amendment Rights.”).

Moreover, 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). In doing so, the TPPA appropriately balances 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.”). Insofar, then, as the TPPA may be seen to infringe on the judiciary’s inherent power to prescribe rules for practice and procedure, the public-

policy concerns addressed by enactment of the TPPA warrant deference to the legislature.

CONCLUSION

For the reasons stated, Plaintiff's constitutional challenge should be deemed waived. Alternatively, the Court should hold that the Tennessee Public Participation Act, Tenn. Code Ann. §§ 20-17-101 to -110, does not violate the constitutional right to a jury trial or the separation of powers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Certificate of Compliance

I hereby certify that this brief consists of 5125 words in compliance with Tenn. Sup. Ct. R. 46.

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