FIRE
Foundation for Individual Rights and Expression

May 5, 2026

Ms. Kathy S. Mills
Clerk of the Court
Texas Thirteenth Court of Appeals
901 Leopard, 10th Floor
Corpus Christi, Texas 78401

RE: *Phi Theta Kappa v. Marek*, No. 13-25-00386-CV—***Amicus curiae* letter brief of the Foundation for Individual Rights and Expression**

Dear Ms. Mills:

Please accept this *amicus curiae* letter brief from the Foundation for Individual Rights and Expression (FIRE), submitted under Texas Rule of Appellate Procedure 11 in support of Appellant Toni Marek. Please provide a copy of this brief to the Justices, as you see fit.

Statement of Interest

FIRE[1] is a nonpartisan nonprofit that defends the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment rights nationwide without regard to speakers' views—including in Texas[2]—through public advocacy, targeted litigation, and *amicus curiae* filings in cases involving expressive rights.

Because of its experience defending expressive rights, FIRE is keenly aware that litigants often seek to silence their critics by filing frivolous lawsuits, and that anti-SLAPP (Strategic Lawsuits Against Public Participation) statutes like the Texas Citizens Participation Act (TCPA) provide vital procedural and substantive safeguards when those lawsuits target the defendant's protected speech on matters of public concern. The misuse of legal process to stifle protected, public criticism is especially pernicious because it threatens Americans' ability to participate in public

[1] FIRE has not been paid and will not be paid any fee for preparing this brief.

[2] *See, e.g.*, *Fellowship of Christian Univ. Students at Univ. of Tex. at Dall. v. Eltife*, 806 F. Supp. 3d 662 (W.D. Tex. 2025); Will Creeley, *Federal Court Strikes Down Gun Rights Protest Restrictions at Tarrant Community College*, FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION (Mar. 16, 2010), https://www.fire.org/news/federal-court-strikes-down-gun-rights-protest-restrictions-tarrant-county-college [https://perma.cc/ZEK7-YYLW] (detailing defense of student protest in support of gun rights).

debate without fear of incurring steep legal fees to defend against potentially ruinous liability or prior restraints on speech. FIRE submits this brief to urge this Court to reverse with instructions to grant Appellant's TCPA motions and ensure ample breathing space for the First Amendment right to criticize public figures.

Introduction

This appeal seeks faithful application of the TCPA to protect—from a lawsuit seeking a prior restraint—an author's newsgathering and publishing on a matter of public concern. Phi Theta Kappa (PTK) sued Appellant Toni Marek for gathering public records from colleges and universities, interviewing former PTK members, and authoring a book about alleged abuses and improprieties by PTK leadership, including alleged sexual assaults. As part of its lawsuit, PTK asked the district court to enjoin Marek's publication.

After Marek moved for TCPA dismissal, the district court dissolved a temporary restraining order it previously entered and denied PTK's request for a preliminary injunction. PTK then abandoned its claims and hurried to nonsuit its case. Although the district court held a hearing on Marek's TCPA motion to dismiss and her TCPA motion for fees, costs, and deterrence sanctions, it denied the motions without analysis.

That is inconsistent with the TCPA, which protects the right to freely speak on matters of public concern. Tex. Civ. Prac. & Rem. Code § 27.002 (hereinafter "TCPA"); *In re Lipsky*, 460 S.W.3d 579, 584 (Tex. 2015). Because PTK's demand for a prior restraint threatened Marek's ability to exercise that right, TCPA dismissal is apt absent a *prima facie* showing by PTK on its claims. Instead, PTK cut and ran.

Amicus FIRE thus urges this Court, on *de novo* review, to reverse the denial of Marek's TCPA motions and to direct the district court to enter judgment for Marek on the motions. Reversal here not only will vindicate Marek's First Amendment rights, it will also help deter other well-heeled organizations from trying to impose similar prior restraints on their critics.

Argument

I. Marek's TCPA motions survived Plaintiff's nonsuit.

PTK's nonsuit did not moot Marek's TCPA motion for dismissal or her TCPA motion for fees and sanctions. Any other rule would allow plaintiffs to haul a speaker to court and bury them with the expense of filing a TCPA motion, only to leave the speaker with no remedy for defending her First Amendment rights against a meritless lawsuit. That would upset both the letter and spirit of the TCPA.

The law is clear: Once a defendant files a TCPA motion asking for dismissal with prejudice, attorney's fees, or sanctions, the plaintiff cannot avoid those remedies by abandoning or nonsuiting its claims against the defendant. *Gaskamp v. WSP USA, Inc.*, 596 S.W.3d 457, 469 (Tex. App.—Houston [1st] 2020, pet. dismissed); *Kocaoglan v. Law Office of Chris Sanchez, P.C.*, No. 13-19-00596-CV, 2021 Tex. App. LEXIS 286, at *8 (Tex. App.—Corpus Christi-Edinburg Jan. 14, 2021, pet. denied) (mem. op.); *Amini v. Spicewood Springs Animal Hosp., LLC*, No. 03-18-00272-CV, 2019 Tex. App. LEXIS 9722, at *11–12 (Tex. App.—Austin Nov. 7, 2019, no pet.) (mem. op.). This rule tracks the broader principle that "a nonsuit shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief." *Gaskamp*, 596 S.W.3d at 468 (cleaned up); *see also* Tex. R. Civ. P. 162 (nonsuit "shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief").

Of course, the movant still must meet her burden to show the TCPA applies to the nonsuited action or claims. TCPA § 27.005(b); *Gaskamp*, 596 S.W.3d at 469–70 (applying the TCPA burden-shifting steps after holding that nonsuit did not moot TCPA motion); *Amini*, 2019 Tex. App. LEXIS 9722, at *11–*18. But if she does, the nonmovant must meet its *prima facie* burden on the nonsuited claims. TCPA § 27.005(c). And if the nonmovant cannot meet that burden, the trial court must grant requested TCPA remedies like dismissal, costs, and reasonable attorney's fees. *Rauhauser v. McGibney*, 508 S.W.3d 377, 389–90 (Tex. App. 2014), *disapproved of by Hersh v. Tatum*, 526 S.W.3d 462 (Tex. 2017); *Amini*, 2019 Tex. App. LEXIS 9722, at *34.

Marek filed her TCPA motion to dismiss in this case on April 4, 2025. 3.CR.1077. After the district court dissolved PTK's temporary restraining order and denied its request for a preliminary injunction on April 9, 2025, 3.CR.1103, PTK nonsuited its action that same day, 3.CR.1105. Thus, Marek filed her TCPA motion before PTK nonsuited and preserved her right to TCPA remedies. This Court should accordingly follow the rule that Marek's TCPA motions survive PTK's nonsuit, apply the TCPA's burden-shifting framework, and direct entry of judgment for Marek on her TCPA motions.

II. This Court should reverse the district court's summary denial of Marek's TCPA motions defending against an unconstitutional prior restraint.

One of the First Amendment's "chief purpose[s]" is "to prevent previous restraints upon publication," like the one PTK sought against Marek. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931); *see Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968) ("Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgment."). Prior restraints are thus "the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976); *see also CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) ("[P]rior restraints are particularly disfavored.").

For all that, the district court did not conduct a prior-restraint analysis when denying Marek's TCPA motions. In fact, it failed to conduct any analysis at all. That was error, especially because PTK's allegations established it was seeking a prior restraint against Marek's publication on a public issue. *Amicus* urges this Court to reverse.

A. Prior restraints pose a serious threat to First Amendment rights.

"[A] free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). That principle underscores the "special vice" of prior restraints: They impose "an immediate and irreversible sanction," *Neb. Press Ass'n*, 427 U.S. at 559, by suppressing speech "before an adequate determination that it is unprotected by the First Amendment," *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 390 (1973). While the "threat of criminal or civil sanctions after publication 'chills' speech," a prior restraint "'freezes' it." *Neb. Press Ass'n*, 427 U.S. at 559. "The damage can be particularly great when," as here, "the prior restraint falls upon the communication of news and commentary on current events." *Id.*

Prior restraints are thus "accorded the most exacting scrutiny," *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 102 (1979), and carry "a heavy presumption against [their] constitutional validity," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The Supreme Court of the United States has gone so far as to hold the "presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties." *Se. Promotions,* 420 U.S. at 558–59. Under this highly demanding standard of review, the Court has "rejected all manner of prior restraint on publication." *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 149 (1967).

The Texas Supreme Court has likewise consistently held a "hallmark of the right to free speech under both the U.S. and Texas Constitutions is the maxim that prior restraints are a heavily disfavored infringement of that right," and therefore "bear a heavy presumption against their constitutionality." *Kinney v. Barnes*, 443 S.W.3d 87, 93–94 (Tex. 2014). In *Kinney*, the Texas Supreme Court confirmed courts should "refuse to allow even unprotected speech to be banned if restraining such speech would also chill a substantial amount of protected speech." *Id.* at 89. And this Court has similarly emphasized the presumptive invalidity of prior restraints. *See French v. Cmty. Broad. of Coastal Bend, Inc.*, 766 S.W.2d 330, 335 (Tex. App.—Corpus Christi 1989, writ dism'd w.o.j.) ("Any prior restraint of expression comes with a heavy presumption against constitutional validity.").

B. Under the TCPA, PTK's action against Marek warrants dismissal.

PTK's attempt to secure a prior restraint of Marek's speech is precisely the type of speech-chilling action the Legislature intended to thwart with the TCPA. As the Texas Supreme Court explained, the TCPA is "a bulwark against retaliatory lawsuits meant to intimidate or silence citizens on matters of public concern." *Dall. Morning News, Inc. v. Hall*, 579 S.W.3d 370, 376 (Tex. 2019). And what could be intended to "silence" a speaker more than a lawsuit like PTK's, aimed at stopping Marek from publishing about a public issue?

PTK sought an order "[r]estraining and enjoining Marek from publishing her book on April 3, 2025 until PTK has an opportunity to review the content and ensure that its confidential and privileged information will not be unlawfully published." 1.CR.14. That is a textbook prior restraint on publication. *E.g.*, *Kinney*, 443 S.W.3d at 93–94. True, the district court properly denied PTK's request for a preliminary injunction. 3.CR.1103. But the harm was already done: Marek had to retain counsel to defend against PTK's petition, to dissolve the previously entered temporary restraining order, to defeat the preliminary injunction, and to seek affirmative TCPA remedies safeguarding her rights and making her whole for defending against this non-meritorious suit.

Even more to the point, PTK's demand for a pre-publication injunction was a legal action based on Marek's exercise of her right to freedom of speech. TCPA § 27.001(3) (defining "exercise of the right to free speech"); *id.* at § 27.001 (6) (defining "legal action" to include a "petition … that requests … equitable relief"). PTK's lawsuit thus fell squarely within the TCPA's dismissal and fee-shifting scheme.

Yet the district court denied Marek's TCPA motions, without any analysis, ten days after hearing it.[3] The district court made no findings whether Marek met her burden of demonstrating the TCPA applies to PTK's legal action. As explained above, Marek did, so *amicus* urges this Court to so hold on this *de novo* review and to direct judgment for Marek on her TCPA motions.

Nor did the district court examine whether PTK met its burden of establishing a *prima facie* case on all essential elements of its claims. It should have been a straightforward analysis for the district court—after all, it had already dissolved PTK's TRO and held PTK could not seek a pre-publication injunction. That only highlights why this Court can and should reverse outright on *de novo* review, and direct judgment for Marek.

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[3] The entirety of the district court's order reads: "Toni Marek has filed a motion to dismiss, and a motion for fees, under the Texas Citizens Participation Act (TCPA). Being duly advised, the Court hereby DENIES Marek's motions."

Conclusion

Because PTK's action sought to enjoin publication of Marek's book critical of PTK leadership, its action constituted a prior restraint on speech on a matter of public concern, a particularly disfavored form of censorship. The district court should have granted Marek's TCPA motions to make her whole and to deter PTK and others from filing similarly meritless actions in the future. Accordingly, FIRE urges the Court to reverse and direct judgment for Marek on her TCPA motions.

Dated: May 5, 2026

Respectfully,

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<u>**CERTIFICATE OF COMPLIANCE**</u>

Based on Microsoft Word's word count function, this letter brief contains 2,192 words, excluding those exempt portions under Texas Rule of Appellate Procedure 9.4(i)(1).

<u>*/s/ JT Morris*</u>
JT Morris

<u>**CERTIFICATE OF SERVICE**</u>

I certify that on May 5, 2026, a copy of this letter brief was served on all counsel of record through the Texas e-File electronic service function.

<u>*/s/ JT Morris*</u>
JT Morris