

IN THE SIXTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE**SMILEDIRECTCLUB, INC.,
SDC FINANCIAL, LLC and
SMILEDIRECTCLUB, LLC,****Plaintiffs,****v.****NBCUNIVERSAL MEDIA, LLC and
VICKY NGUYEN,****Defendants.****No. 20c1054****JURY DEMAND**

ORDER

Before the Court is Plaintiff's constitutional challenge to Defendants' Motion to Strike Plaintiffs' Complaint Under Tennessee's Public Participation Act. Upon agreement of the parties as set forth in the Case Management Order of May 26, 2021, the parties appeared for oral argument concerning this phase of the Plaintiffs' Response to the Motion to Strike. Following review of the June 25, 2021 hearing, supplemental briefing on the matter, and the record as a whole, the Court finds the Plaintiffs' constitutional challenge to the Tennessee Public Participation Act fails.

PROCEDURAL HISTORY

The matter before the Court arises out of a claim for defamation filed by the Plaintiffs on May 18, 2020. On July 13, 2020 Defendants filed a Motion to Strike the Complaint (hereinafter "TPPA Petition") pursuant to TENN. CODE ANN. § 20-17-101, *et seq.*, the Tennessee Public Participation Act ("TPPA"). On October 30, 2020, this Court entered an Order permitting the Plaintiffs to seek "specified and limited" discovery to respond to the Defendants' TPPA Petition. The parties were further Ordered to file supplemental briefing addressing the application of the Media Shield Law to be heard on January 12, 2021.

On January 12, 2021, the Court heard the parties' argument concerning the Media Shield Law, and raised a further issue concerning the application of TENN. CODE ANN. § 20-17-105(c). Specifically, this Court requested supplemental briefing with respect to the relationship between the requirement to dismiss the action if the defendants "establish[ed] a valid defense to the claim in the legal action," and the Tennessee Rules of Civil Procedure. On May 19, 2021 the Tennessee Office of the Attorney General filed a brief regarding the limited issue of the Constitutionality of the TPPA. An Agreed Order for the Attorney General to intervene on the issue of constitutionality was entered on June 14, 2021.

Following a Case Management Conference on May 26, 2021, the parties agreed to bifurcate the Plaintiffs' response to the TPPA Petition. Accordingly, the Plaintiffs' constitutional challenges to the TPPA were set for hearing on June 25, 2021. A further hearing, if necessary, regarding the Plaintiffs' factual burden, is set for October 5, 2021.

ANALYSIS

Plaintiffs' Response to the Defendants' TPPA Petition raises two facial challenges regarding the constitutionality of the Tennessee Public Participation Act. Specifically, the Plaintiffs assert that Tenn. Code Ann. § 20-17-105 established a mechanism that (1) denied the Plaintiffs of the inviolate right to a jury trial, and (2) impermissibly encroaches on the powers reserved to the Judiciary in violation of the Separation of Powers Doctrine.

It is well-settled in Tennessee that "courts do not decide constitutional questions unless resolution is absolutely necessary to determining the issues in the case and adjudicating the rights of the parties." *State v. Taylor*, 70 S.W.3d 717, 720 (Tenn. 2002). "In evaluating the constitutionality of a statute, we begin with the presumption that an act of the General Assembly is constitutional." *State v. Pickett*, 211 S.W.3d 696, 700 (Tenn. 2007).

A constitutional challenge to a statute may be either facial or as-applied. The presumption of constitutionality applies with even greater force when a party brings a facial challenge to the validity of a statute. *Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003). In such an instance, the challenger must establish that no set of circumstances exists under which the statute, as written, would be valid. *Lynch v. City of Jellico*, 205 S.W.3d 384, 390 (Tenn. 2006) (quoting *Davis–Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 525 (Tenn. 1993))

A. Right of Trial by Jury

Article I, Section 6 of the Tennessee Constitution provides “[t]hat the right of trial by jury shall remain inviolate.” “This right has been interpreted to be a trial by jury as it existed at common law or more specifically, the common law under the laws and constitution of North Carolina at the time of the adoption of the Tennessee Constitution of 1796.” *Helms v. Tennessee Dept. of Safety*, 987 S.W.2d 545, 547 (Tenn. 1999)(internal quotations omitted).

Plaintiffs assert that the TPPA requires this Court to make a fact-weighting and merits-based determination in violation of this important constitutional right. Specifically, the Plaintiffs assert that the Tennessee Supreme Court in *Webb v. Nashville Area Habitat for Humanity, Inc.*, held that the motion to dismiss stage of a legal proceeding is “particularly ill-suited for an evaluation of the likelihood of success on the merits or of the weight of the facts pleaded, or as a docket-clearing mechanism.” 346 S.W.3d 422, 437 (Tenn. 2001).

In *Webb*, the Tennessee Supreme Court rejected the “plausibility standard” adopted and refined by the Federal Judiciary in the cases of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and upheld the “well-established” notice pleading regime of TENN. R. CIV. P. 8. See 346 S.W.3d at 425-27. The *Webb* Court held that “the *Twombly/Iqbal* standard requiring the trial court to scrutinize and weigh the facts to determine if they present

a plausible claim, and allowing the court to dismiss the case at the pleading stage if it determines, in light of its judicial experience and common sense, that the claim is not plausible, raises potential concerns implicating the Tennessee constitutional mandate that the right of trial by jury shall remain inviolate. Tenn. Const. art. I, § 6.” *Id* at 432 (internal quotations and citations omitted).

In light of the *Webb* holding, Plaintiffs assert that the TPPA requires this Court to *weigh* the evidence and determine, at the inception of the case, whether a plaintiff’s claim has met a threshold level of merit. *See* TENN. CODE ANN. § 20-17-105(b)-(f).

Plaintiffs interpret TENN. CODE ANN. § 20-17-105(c) as requiring the Court to determine whether Plaintiffs have established a *prima facie* case under a “likelihood of prevailing” standard. This exercise would necessarily require the Court to weigh and evaluate the evidence. Plaintiffs additionally challenge TENN. CODE ANN. § 20-17-105(c) which requires this Court to dismiss the action if the Defendants establish a valid defense. It is the Plaintiffs’ contention that the Court must engage in a factual evaluation of the merits of the action and weigh the evidence in order to determine if the Defendant has “established a valid defense.”

Accordingly, this Court is now called upon to construe the TPPA to determine whether the mechanism of the TPPA Petition violates the well-established Constitutional right to have a jury decide the facts concerning Plaintiffs’ defamation claim.

“When called upon to construe a statute, the courts must first ascertain and then give full effect to the General Assembly’s intent and purpose.” *Waldschmidt v. Reassure Am. Life Ins. Co.*, 271 S.W.3d 173, 176 (Tenn. 2008)(citing *Auto Credit of Nashville v. Wimmer*, 231 S.W.3d 896, 900 (Tenn.2007); *State ex rel. Pope v. U.S. Fire Ins. Co.*, 145 S.W.3d 529, 534–35 (Tenn. 2004)). “As a Court we take the Act as it was written by the Legislature, not as we would write it.” *Jackson v. Jackson*, 210 S.W.2d 332, 334 (Tenn. 1948), “[T]herefore, [the Court’s] search for a statute’s

meaning and purpose must begin with the words of the statute.” *Blankenship v. Estate of Bain*, 5 S.W.3d 647, 651 (Tenn.1999).

When the statutory language is clear and unambiguous, we apply the plain language in its normal and accepted use. *Boarman v. Jaynes*, 109 S.W.3d 286, 291 (Tenn.2003) (citing *State v. Nelson*, 23 S.W.3d 270, 271 (Tenn. 2000)). This Court must “(1) give these words their natural and ordinary meaning, (2) consider them in the context of the entire statute, and (3) presume that the General Assembly intended that each word be given full effect.” *Waldschmidt*, 271 S.W.3d at 176 (citing *Lanier v. Rains*, 229 S.W.3d 656, 661 (Tenn. 2007); *State v. Flemming*, 19 S.W.3d 195, 197 (Tenn. 2000)). “When a statute is ambiguous, however, [the Court] may reference the broader statutory scheme, the history of the legislation, or other sources to discern its meaning.” *Waters v. Farr*, 291 S.W.3d 873, 881 (Tenn. 2009).

20-17-105(b)

Pursuant to the TPPA, once the Defendant has established a *prima facie* case that the action brought by the Plaintiffs is “based on, relates to, or is in response to [defendant’s] exercise of the right to free speech, right to petition, or right of association” the burden shifts to the Plaintiffs to establish “a prima facie case for each essential element of the claim in the legal action.” TENN. CODE ANN. § 20-17-105(a)-(b).

“Prima facie evidence is defined as evidence good and sufficient; such evidence as, in the judgment of the law, is sufficient to establish a given fact BLACK’S LAW DICTIONARY (4th ed. 1951). As this Court has stated previously, to establish a *prima facie* case, the Plaintiffs must provide some credible proof, standing alone and un rebutted, to support each essential element of Plaintiffs’ claim.

In light of this definition of *prima facie*, the Court finds that Tenn. Code Ann. § 20-17-105(b),

requiring a *prima facie* case for each element of the Plaintiffs' claim, is clear and unambiguous. The plain language of the statute, "establishes a *prima facie* case" does not require this Court to make an evaluation regarding the merits of the facts presented to the Court. Instead, the Court makes the familiar determination of whether the facts asserted by the Plaintiff, standing alone and un rebutted, are sufficient to support a finding for each element of the Plaintiffs action. Accordingly, the *prima facie* requirement of TENN. CODE ANN. § 20-17-105(b) does not violate the Plaintiffs right to a jury trial.

20-17-105(c)

The Court must also address the Plaintiffs' assertion that TENN. CODE ANN. § 20-17-105(c) requires a factual determination and weighing of evidence such that it violates the Plaintiffs' right to a jury trial.

The text of TENN. CODE ANN. § 20-17-105(c) provides: "Notwithstanding subsection (b), the court shall dismiss the legal action if the petitioning party establishes a valid defense to the claims in the legal action." At issue here is the phrase "establishes a valid defense" which, according to the Plaintiffs, requires this Court to weigh the *prima facie* case established under subsection (b) against any defense raised by the Defendants. In the alternative, Defendants, and the Tennessee Attorney General's Office, would have this Court interpret "establishes a valid defense" to require the Court to apply a summary judgment standard when evaluating the proposed defense.

When the statutory language is clear and unambiguous, the Court will apply the plain language in its normal and accepted use. Here the plain language provided by the legislature requires the Court to determine whether a valid defense has been established. As an initial matter, the Court notes that the phrase "establishes a valid defense" is not a standard of review. Nor does the Legislature provide the Court with a standard of review by which to determine if the asserted

defense is valid and established.

When addressing a statutory provision, the Court must “(1) give these words their natural and ordinary meaning, (2) consider them in the context of the entire statute, and (3) presume that the General Assembly intended that each word be given full effect.” *Waldschmidt*, 271 S.W.3d at 176.

First, it is clear that the standard by which the Court must determine whether a valid defense has been established differs from the *prima facie* case required under TENN. CODE ANN. § 20-17-105(a)-(b). Had the Legislature intended for the Court to apply the *prima facie* standard, the language of TENN. CODE ANN. § 20-17-105(c) would include such a provision. Accordingly, the Court finds the phrase “establishes a valid defense” should not be interpreted as requiring the Defendants to simply make a *prima facie* showing as to the asserted defense. Instead, Defendants must offer more to establish a valid defense.

The essential question is, what did our legislature intend to mean by using the verb *establishes* in subpart (c)?¹ This is compounded by the fact that the legislature utilized the same word in subpart (b).²

Black’s Law Dictionary defines “establish” as “[t]o settle or fix firmly; place on a permanent footing; found; create; **put beyond doubt or dispute; prove; convince.** BLACK’S LAW DICTIONARY (4th ed. 1951) (emphasis added). Furthermore, the term valid is defined as “[h]aving legal strength or force, executed with proper formalities, **incapable of being rightfully overthrown or set aside.** *Id.* (emphasis added). Merriam-Webster further defines “establish,” when used to prove something, as being “to put beyond doubt.” *Merriam-Webster.com Dictionary*,

¹ Borrowing the observation of Chief Justice Burger: “This recalls Lewis Carroll’s class advice on the construction of language: “ ‘When I use a word,’ Humpty Dumpty said, in rather a scornful tone, ‘it means just what I choose it to mean—neither more nor less.’ ” Through the Looking Glass, in *The Complete Works of Lewis Carroll* 196 (1939).” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174, 98 S. Ct. 2279, 2291, 57 L. Ed. 2d 117 (1978)

² “the court shall dismiss the legal action unless the responding party establishes a *prima facie* case for each essential element of the claim in the legal action.” Tenn. Code Ann. § 20-17-105(b)

MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/establish> (last visited July 13, 2021).

Although the same word is used in subpart (b), it is used in conjunction with a well-defined legal term – *prima facie*. In that context the verb cannot connote “without doubt” since the legal term simply means something is valid at first impression and not yet challenged. In subpart (c) the context is that a valid defense must be established. This leads to the inescapable conclusion that the existence of a valid defense, at this early stage, must be without doubt.³ Such defenses may, of course, be proven later at trial by the appropriate legal standard, usually by a preponderance of the evidence.

The Court finds it prudent to reiterate that in reviewing this statute in light of a constitutional challenge, the Court is required to indulge every presumption and resolve every doubt in favor of the constitutionality of the statute. *In re Burson*, 909 S.W.2d 768, 775 (Tenn. 1995) (citing *State v. Lyons*, 802 S.W.2d 590, 592 (Tenn. 1990)). “The Court must uphold the constitutionality of a statute wherever possible[.]” *State v. McCoy*, 459 S.W.3d 1, 8 (Tenn. 2014).

In light of this mandate, as well as the aforementioned definitions, the Court may reasonably interpret the natural and ordinary meaning of “establishes a valid defense” to require the Defendant to show, beyond doubt or dispute, a defense having legal strength of force, that is incapable of rightfully being overthrown or set aside. In doing so, the Court finds that the ordinary meaning of the language employed by the Legislature in TENN. CODE ANN. § 20-17-105(c) echoes the standard of review applied by the Judiciary when addressing Rule 56 Motions.

First, the Court must determine that the defense is beyond doubt and incapable of rightfully

³ As Justice Holmes famously observed: “A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.” *Towne v. Eisner*, 245 U.S. 418, 425 (1918)

being set aside. In other words, the Court must determine that no reasonable minds could differ. Furthermore, the Defense must have legal strength of force. Likewise, a Rule 56 Motion requires that the moving party show they are entitled to judgment as a matter of law.

While the natural meaning of establish a valid defense does not specifically invoke the standard of review in a Rule 56 Motion, the Court is required to indulge every presumption and resolve every doubt in favor of the constitutionality of the statute. *In re Burson*, 909 S.W.2d 768, 775 (Tenn. 1995). Likewise, the Court must operate under the presumption that an act of the General Assembly is constitutional.” *State v. Pickett*, 211 S.W.3d 696, 700 (Tenn.2007). As the Legislature has knowledge of the state of the law at the time it passes legislation, it is reasonable for this Court to infer the Legislature was aware of the Rule 56 standard and employed similar language to invoke that standard.

A Court would then employ the procedural mechanisms associated with a motion for summary judgment when determining whether reasonable minds could differ concerning the validity of any such defense. Accordingly, further discovery would be allowed concerning these defenses, the parties would be required to submit properly supported statements of uncontested material facts, and every inference would be determined in favor of the opposing party. If the Court finds that reasonable minds could reach different conclusions, then the matter would not be dismissed and would proceed to trial.

As this evaluation does not require the Court to weigh evidence or make a merit based determination, the Court finds that TENN. CODE ANN. § 20-17-105(c) does not violate the Plaintiffs’ right to a jury trial. Accordingly, Plaintiffs’ constitutional challenge on this basis is without merit.

B. Separation of Powers

Article II, section 1, of the Tennessee Constitution provides that “The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial.” Tenn. Const. art II § 1. “No person or persons belonging to one of these departments [set forth] shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.” *Id.*

“By the terms of our constitution, [o]nly the Supreme Court has inherent power to promulgate rules governing the practice and procedure of the courts of this state, and this inherent power exists by virtue of the [Constitution's] establishment of a Court and not by largess of the legislature.” *Willeford v. Klepper*, 597 S.W.3d 454, 465-66 (Tenn. 2020) (citing *State v. McCoy*, 459 S.W.3d 1, 9 (Tenn. 2014))(internal quotation marks omitted).

An analysis of the separation of powers doctrine, in light of a facial challenge to the constitutionality of a statute, requires this Court to determine whether the TPPA is procedural or substantive. *See id.* at 466. Statutes in which the Legislature enact or further a substantive law lie within the Legislative Power and do not implicate the separation of powers doctrine. *See State v. Mallard*, 40 S.W.3d 473, 481 (Tenn. 2001).

“The Tennessee Supreme Court has defined 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)(citing *Spencer Kellogg & Sons, Inc. v. Lobban*, 315 S.W.2d 514, 518 (1958)).

“Of course, statutes at times may not appear to fall exclusively into either a procedural or substantive classification. We have held that where a statute contains some procedural aspects, but

those provisions are so intimately intertwined with the substantive rights created by the statute, that statute will not impermissibly intrude on the practice and procedure of the courts in a constitutional sense, causing a constitutional challenge to fail.” *Willeford*, 597 S.W.3d at 466 (citing *Massey v. David*, 979 So. 2d 931, 937 (Fla. 2008)).

Upon review of the TPPA, the Court finds that it unequivocally creates a unique procedural mechanism for the accelerated review of claims, independent of those contained in Rule 12 and 56. However, as stated in TENN. CODE ANN. § 20-17-102, the Court finds that the overarching purpose of the TPPA is not the establishment of this mechanism, but the preservation of the right to petition, speak, and associate freely, balanced against the right to pursue meritorious lawsuits.

“When legislative enactments (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, then considerations of comity amongst the coequal branches of government counsel that the courts not turn a blind eye.” *Mallard*, 40 S.W.3d at 481 (citing *Newton v. Cox*, 878 S.W.2d 105, 112 (Tenn.1994)).

Here the Court finds that the TPPA’s procedural enactments, specifically the establishment of the TPPA Petition, and the limitations placed on discovery, are both reasonable and workable within the framework already adopted by the judiciary.

Notably, the TPPA does not prohibit litigants from pursuing alternative dispositive motions such as those preserved by Rules 12 and 56. As brought to the attention of the Senate Judiciary Committee prior to enacting the TPPA, the TPPA petition provides an additional dispositive mechanism to those already provided by Tennessee Rules of Civil Procedure. *See Hearing on S.B. 1097 Before the S. Judiciary Comm.*, 11th Gen. Assemb. (Tenn. Mar. 12, 2019). Furthermore, this additional mechanism does not require the Court to dismiss meritorious cases, but provides an

alternative mechanism by which the Court can make an accelerated determination on whether the Plaintiffs' claims are insufficient under the *prima facie* standard.

Nor do the provisions of TENN. CODE ANN. § 20-17-104 impermissibly infringe on the Judiciary's discretion in determining rules of discovery. TENN. CODE ANN. § 20-17-104(d) specifically enables this Court to allow specified and limited discovery for good cause shown. As noted above, it is clearly within the purview of the court to order additional discovery as needed.

Accordingly, the Court finds that although the TPPA creates a unique procedural mechanism, that mechanism is so entwined with the substantive rights created by the statute that considerations of comity instruct this Court permit this intrusion. The Court further finds that the provisions of the TPPA are reasonable and workable and supplement the procedural rules already established by the Judiciary.

Therefore, the Court finds that the Plaintiffs' constitutional challenge on the basis of the separation of powers doctrine is without merit.

Accordingly, it is **ORDERED, ADJUDGED** and **DECREED** that the Plaintiff's constitutional challenge to the TPPA is respectfully **DENIED**. Parties are further **ORDERED** to file the necessary briefs to comply with the May 21, 2021 Case Management Order regarding phase two of the Plaintiffs' Response to the Defendants' Motion to Strike.

IT IS SO ORDERED.

Entered this _____ day of July, 2021.


THOMAS W. BROTHERS, JUDGE

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing by postage prepaid, U.S. Mail upon the following:

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This, the ____ day of May, 2021.


Deputy Clerk