IN THE CIRCUIT COURT FOR LINCOLN COUNTY, TENNESSEE
THE SEVENTEENTH JUDICIAL DISTRICT, PART II, AT FAYETTEVILLE

DOROTHY SMALL, TONYA ALLEN, and ROGER MARTINEZ,

Plaintiffs,

v.

JON LAW and TINA TOWRY OSGOOD (correctly TINA MARIE SANDERS),

Defendants.

Case No. 23-CV-132

ORDER ON DEFENDANTS' TENN. CODE ANN. § 20-17-104(a) PETITION TO DISMISS THE PLAINTIFFS' COMPLAINT PURSUANT TO THE TENNESSEE PUBLIC PARTICIPATION ACT

This matter came before the Court for hearing on the 13th day of December, 2023, upon the *Defendants' Tenn. Code Ann. § 20-17-104(a) Petition to Dismiss Plaintiffs' Complaint Pursuant to the Tennessee Public Participation Act* ("TPPA"). Upon consideration of the Defendants' Petition, Memorandum of Law in Support of their Petition, the Plaintiffs' Response in opposition thereto, the Defendants' Reply, the arguments of counsel, and the entire record, the Court finds and **ORDERS** the following:

As an initial consideration, the Court must consider the most recent filings by the parties while a decision on the *Petition to Dismiss Plaintiffs' Complaint Pursuant to the Tennessee Public Participation Act* was under advisement. On January 9, 2024, Plaintiffs filed a *Notice of Voluntary Dismissal Without Prejudice*, together with a proposed *Order of Voluntary Dismissal*. On that same day, Defendants filed an *Objection to Plaintiffs' Notice of Voluntary Dismissal Without Prejudice*.

Rule 41 of the Tennessee Rules of Civil Procedure "permits liberal use of voluntary nonsuits at any time prior to 'final submission' to the trial court for decision in a bench trial...." *Himmelfarb v. Allain*, 380 S.W.3d 35, 40 (Tenn.2012) (citing Tenn. R. Civ. P 41.01 adv. comm. cmt.; Lawrence A. Pivnick, 1 *Tennessee Circuit Court Practice* § 23:1 (2011)). In a bench trial, the petitioner's right to voluntary dismissal without prejudice "continues only 'until the matter has been finally submitted to the court for determination on the merits.'" *Lacy v. Cox*, 152 S.W.3d 480, 486 n. 14 (Tenn.2004) (citing *Weedman v. Searcy*, 781 S.W.2d 855, 857 (Tenn.1989)). Rule 41.01 indicates that a party may take a voluntary nonsuit "by filing a written notice of dismissal at any time before the trial of a cause and serving a copy of the notice upon all parties." Tenn. R. Civ. P. 41.01.

In this case, the Court is simply precluded from entering the Order of Voluntary Dismissal because the Defendants' TTPA Petition has been fully heard, all exhibits and arguments have been submitted, and such has been tendered as a "final submission" to the trial court. Had the Voluntary Dismissal been requested prior to final closing arguments on December 13, 2023, this Court may have found itself in a much different posture.

In addition, Rule 41 further limits the use of voluntary nonsuits in certain situations. For example, a party may not take a voluntary nonsuit while an opposing party's motion for summary judgment is pending. See Tenn. R. Civ. P. 41.01. In this case, the Defendants filed a Motion for Summary Judgment on November 15, 2023. Said Motion for Summary Judgment is pending. Therefore, at this time, this Court is simply precluded from entering the Order of Voluntary Dismissal.

TPPA PETITION CONSIDERATION

Tenn. Code Ann. § 20-17-104(a) provides that "[i]f a legal action is filed in response to a

party's exercise of the right of free speech, right to petition, or right of association, that party may petition the court to dismiss the legal action." See *id.* "Such a petition may be filed within sixty (60) calendar days from the date of service of the legal action or, in the court's discretion, at any later time that the court deems proper." Tenn. Code Ann. § 20-17-104(b). "A response to the petition, including any opposing affidavits, may be served and filed by the opposing party no less than five (5) days before the hearing or, in the court's discretion, at any earlier time that the court deems proper." Tenn. Code Ann. § 20-17-104(c).

In the case *sub judice*, the unverified Complaint was filed on October 26, 2023. The unverified Complaint was filed by three elected officials, all being Aldermen for the City of Fayetteville. Complaint ¶ 7. The Plaintiffs filed suit against two private citizens for invasion of privacy based upon the Defendants' "publication of Plaintiffs' personal mobile phone numbers" on Facebook as part of Defendants' petitioning campaigns against, in their view, unwarranted tax increases and the City's alleged failure to maintain its parks. In response to the Complaint, Defendants filed their Tennessee Public Participation Act (TPPA) petition under Tenn. Code Ann. § 20-17-104(a) on November 15, 2023.

Inasmuch as the Court's analysis involves issues of statutory construction and interpretation, the Court will adhere to the following longstanding principles:

> "When dealing with statutory interpretation, well-defined precepts apply. Our primary objective is to carry out legislative intent without broadening or restricting the statute beyond its intended scope. *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 678 (Tenn. 2002). In construing legislative enactments, we presume that every word in a statute has meaning and purpose and should be given full effect if the obvious intention of the General Assembly is not violated by so doing. *In re C.K.G.*, 173 S.W.3d 714, 722 (Tenn. 2005). When a statute is clear, we apply the plain meaning without complicating the task. *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004). Our obligation is simply to enforce the written language. *Abels ex rel. Hunt v. Genie Indus., Inc.*, 202 S.W.3d 99, 102 (Tenn. 2006). It is only when a statute is ambiguous that we may reference the broader statutory scheme, the history of the legislation, or other sources. *Parks v. Tenn.*

Mun. League Risk Mgmt. Pool, 974 S.W.2d 677, 679 (Tenn. 1998). Further, the language of a statute cannot be considered in a vacuum, but 'should be construed, if practicable, so that its component parts are consistent and reasonable.' *Marsh v. Henderson*, 221 Tenn. 42, 424 S.W.2d 193, 196 (1968). Any interpretation of the statute that 'would render one section of the act repugnant to another' should be avoided. *Tenn. Elec. Power Co. v. City of Chattanooga*, 172 Tenn. 505, 114 S.W.2d 441, 444 (1937). We also must presume that the General Assembly was aware of any prior enactments at the time the legislation passed. *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995)."

In re Estate of Tanner, 295 S.W.3d 610, 613-14 (Tenn. 2009).

As cited by the Tennessee Court of Appeals in *Pragnell v. Franklin*, the Court has recently explained with respect to the TPPA:

"The underlying matter involves the application of Tennessee's Anti-SLAPP law, the TPPA .... SLAPP suits are lawsuits used "as a powerful instrument of coercion or retaliation" against a defendant, *George W. Pring & Penelope Canan, "Strategic Lawsuits Against Public Participation" ("SLAPPS"): An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT L. REV. 937, 942 (1992) (quoting *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 740-41, 103 S. Ct. 2161, 76 L.Ed.2d 277 (1983)), and anti-SLAPP legislation such as the TPPA is designed to counteract such lawsuits and prevent "meritless suits aimed at silencing a plaintiff's opponents, or at least diverting their resources." John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOY. L.A. L. REV. 395, 396 (1993).

Enacted in 2019, the TPPA is designed 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. As with the typical design of anti-SLAPP statutes, the TPPA works to "discourage[ ] and sanction[ ] frivolous lawsuits and permits the early disposition of those cases before parties are forced to incur substantial litigation expenses." Todd Hambridge et al., *Speak Up.*, 55 Tenn. B.J. 14, 15 (2019). Although it has been noted that Tennessee had a limited anti-SLAPP statute before the TPPA, the TPPA "broadens anti-SLAPP protection." *Id.*

The TPPA provides relief for parties who partake in protected activity constituting either the exercise of the right of association, the exercise of the right of free speech, or the exercise of the right to petition. Tenn. Code Ann. §§ 20-17-104(a), 20-17-105. Specifically, if the petitioning party makes a prima facie case that they have participated in protected activity under the TPPA, the court may then dismiss the action against them, "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(a)(b). The TPPA also provides definitions as to what constitutes these forms of protected activity. For example, an "exercise of the right of

> association" is an "exercise of the constitutional right to join together to take collective action on a matter of public concern that falls within the protection of the United States Constitution or the Tennessee Constitution." Tenn. Code Ann. § 20-17-103(2). An "exercise of the right of free speech" means "a communication made in connection with a matter of public concern or religious expression that falls within the protection of the United States Constitution or the Tennessee Constitution." Tenn. Code Ann. § 20-17-103(3). Finally, an "exercise of the right to petition" means "a communication that falls within the protection of the United States Constitution or the Tennessee Constitution and: (A) Is intended to encourage consideration or review of any issue by a federal, state, or local legislative, executive, judicial, or other governmental body; or (B) Is intended to enlist public participation in an effort to effect consideration of an issue by a federal, state, or local legislative, executive, judicial, or other governmental body[.]" Tenn. Code Ann. § 20-17-103(4).
>
> Notably, the definitions above reveal that both the "exercise of the right of association" and the "exercise of the right of free speech" require that the activity be connected with a "matter of public concern." Tenn. Code Ann. § 20-17-103(2-3). As defined by the statute, a "matter of public concern" includes issues relating to: "(A) Health or safety; (B) Environmental, economic, or community well-being; (C) The government; (D) A public official or public figure; (E) A good, product, or service in the marketplace; (F) A literary, musical, artistic, political, theatrical, or audiovisual work; or (G) Any other matter deemed by a court to involve a matter of public concern." Tenn. Code Ann. § 20-17-103(6). As should be evident—and as some commentators have already observed—matters of public concern are "broadly defined" under the statute. Todd Hambridge et al., *Speak Up.*, 55 Tenn. B.J. 14, 15 (2019). Unlike the enumerated categories pertaining to "the exercise of the right of association" and the "exercise of the right of free speech," the "exercise of the right to petition" contains no statutory qualifier requiring that the activity involve a "matter of public concern." Again, under the statute, "exercise of the right to petition" simply means a "communication" that is constitutionally protected and is "intended to encourage consideration or review of an issue" by some form of governmental body or is "intended to enlist public participation in an effort to effect consideration of an issue" by a governmental body. Tenn. Code Ann. § 20-17-103(4)(A),(B)."

Pragnell v. Franklin, No. E2022-00524-COA-R3-CV, 2023 WL 2985261, at *6–7 (Tenn. Ct. App. Apr. 18, 2023) citing *Doe v. Roe*, 638 S.W.3d 614, 617-19 (Tenn. Ct. App. 2021) (footnote omitted).

A Tennessee Public Participation Act (TPPA) petition filed under Tenn. Code Ann. § 20-17-104(a) is subject to a three-step inquiry. See *Pragnell v. Franklin*, No. E2022-00524-COA-R3-CV, 2023 WL 2985261, at *8–12 (Tenn. Ct. App. Apr. 18, 2023) (addressing the "first step

of the TPPA dismissal analysis," the "second step of the TPPA dismissal procedure[,]" and the "third step of the TPPA's dismissal procedure"). When adjudicating a TPPA petition, only "admissible evidence" may be considered. See Tenn. Code Ann. § 20-17-105(d) ("The court may base its decision on supporting and opposing sworn affidavits stating admissible evidence upon which the liability or defense is based and on other admissible evidence presented by the parties.").

During step one of the TPPA's dismissal analysis, the Court must determine whether the petitioning Defendants have "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[.]'" *Pragnell*, 2023 WL 2985261, at *11 (quoting Tenn. Code Ann. § 20-17-105(a)). If the petitioning Defendants meet their burden at step one, the Court then turns to the second step of the TPPA's dismissal procedure.

At step two of the TPPA's dismissal procedure, the burden shifts to the Plaintiffs to establish a prima facie case for each essential element of their claims. See *Pragnell*, 2023 WL 2985261, at *10 ("The TPPA's burden-shifting framework provides that '[i]f the petitioning party meets this burden [of 'making a prima facie case that a legal action against the petitioning party is based on, relates to, or is in response to that party's exercise of the right to free speech'], 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.'") (quoting Tenn. Code Ann. § 20-17-105(b)). If the Plaintiffs fail to meet their evidentiary burden at this stage, then the Court "shall dismiss" the Plaintiffs' claims. See Tenn. Code Ann. § 20-17-105(b).

If the Plaintiffs meet their burden at step two of the TPPA's dismissal procedure, then the Court turns to the third step: "whether Defendants [have] 'establish[ed] a valid defense to

the claims in the legal action.'" *Pragnell*, 2023 WL 2985261, at *12 (quoting Tenn. Code Ann. § 20-17-105(c)). If the Defendants have established a valid defense to the Plaintiffs' claims, then the Court "shall dismiss" the Plaintiffs' claims. See Tenn. Code Ann. § 20-17-105(c) ("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.").

The Court will endeavor to consider all three (3) steps below:

Initially, as mentioned above, the Court must consider "admissible evidence" in consideration of the three-step analysis. The record established the following:

A. Defendants' Evidence

In support of their TPPA Petition, the Defendants initially submitted seven (7) exhibits, namely:

1. Plaintiff Tonya Allen's Candidate Nominating Petition containing her cell phone number (Ex. 1);

2. Plaintiff Roger Martinez's Candidate Nominating Petition containing his cell phone number (Ex. 2);

3. An advertisement from Plaintiff Roger Martinez in which Plaintiff Martinez published his cell phone number (Ex. 3);

4. The Declaration of Defendant Jon Law (Ex. 4);

5. The Declaration of Donna Hartman (Ex. 5);

6. The Declaration of Defendant Tina Sanders, who is identified in the Plaintiffs' Complaint as Tina Osgood (Ex. 6);

7. The website for Fayetteville's Board of Mayor and Aldermen (BOMA) that displays the same phone number for each BOMA member (Ex. 7); and

8. The Court has also considered the information attached to the Notice of Filing which is derived from a public document from the Fayetteville Regional Planning Commission dated September 28, 2022.

To date, Plaintiffs have not objected to or otherwise contested the admissibility of any of the evidence submitted by the Defendants. Accordingly, the Court determines that all of the Defendants' evidence is admissible and considers the evidence for its natural probative effects. See *Bannor v. Bannor*, No. E2022-00507-COA-R3-CV, 2023 WL 3071341, at *9 (Tenn. Ct. App. Apr. 25, 2023) ("We have explained that when a party fails to object to the admissibility of evidence, 'the evidence becomes admissible notwithstanding any other Rule of Evidence to the contrary, and the [trier of fact] may consider that evidence for its 'natural probative effects as if it were in law admissible.'") (quoting *Pearson v. Ross*, No. W2011-00321-COA-R3CV, 2011 WL 6916194, at *4 (Tenn. Ct. App. Dec. 28, 2011) (in turn quoting *Dixon v. Cobb*, No. M2006-00850-COA-R3-CV, 2007 WL 2089748, at *8 (Tenn. Ct. App. July 12, 2007)).

B. Plaintiffs' Evidence

In response to the Defendants' TPPA Petition, the Plaintiffs did not submit evidence.

STEP 1: THRESHOLD ISSUE

First, the Court must note that the traditional T.R.C.P. Rule 12 dismissal procedure does not apply when dismissal is sought pursuant to the TPPA. Instead, when a party files a motion to dismiss based on the TPPA, the dismissal procedure delineated in the TPPA should be followed regarding the respective claims. To hold otherwise would render the dismissal provision contained within the TPPA statute meaningless. "In interpreting a statute, we must avoid constructions which would render portions of the statute meaningless or superfluous." *Leab v. S & H Mining Co.*, 76 S.W.3d 344, 350 n.3 (Tenn. 2002).

Therefore, "the threshold step in [this Court's] analysis must be to determine whether the claim falls within the TPPA's parameters." *Reiss v. Rock Creek Constr., Inc.*, No. E2021-01513-COA-R3-CV, 2022 WL 16559447, at *6 (Tenn. Ct. App. Nov. 1, 2022). "This is determined by analyzing whether the petitioning party has demonstrated '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 certain protected rights." *Id.* (quoting Tenn. Code Ann. § 20-17-105(a)).

Here, as the petitioning parties, the Defendants assert that the Plaintiffs' invasion of privacy claims are based on, relate to, or were filed in response to both the Defendants' "exercise of the right of free speech" and their "right to petition" within the meaning of Tenn. Code Ann. § 20-17-103(3) and Tenn. Code Ann. § 20-17-103(4). In their Response, the Plaintiffs do not contest this assertion. As a result, opposition at step one of the TPPA's dismissal analysis is waived.

Regardless of waiver, the Court finds that the Defendants have met their burden of establishing a prima facie case that the Plaintiffs' legal action is based on, relates to, or is in response to their exercise of the right to free speech and their right to petition as defined by the TPPA under Tenn. Code Ann. § 20-17-105(a) ("The petitioning party has the burden of making a prima facie case that a legal action against the petitioning party is based on, relates to, or is in response to that party's exercise of the right to free speech, right to petition, or right of association."). The grounds for this finding are set forth below.

Exercise of the right of free speech

Tenn. Code Ann. § 20-17-103(3) explains that "Exercise of the right of free speech" means a communication made in connection with a matter of public concern or religious expression that falls within the protection of the United States Constitution or the Tennessee

Constitution." To further unpack this definition, Tenn. Code Ann. § 20-17-103(6) provides that "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;
(E) A good, product, or service in the marketplace;
(F) A literary, musical, artistic, political, theatrical, or audiovisual work; or
(G) Any other matter deemed by a court to involve a matter of public concern...

Here, the Court finds that the Defendants have established a prima facie case that the Plaintiffs' legal action against them is based on, relates to, or is in response to their exercise of the right of free speech as defined by Tenn. Code Ann. § 20-17-103(3) and (6). In particular, the Court finds that the Defendants have established that the Plaintiffs have sued the Defendants for communications made in connection with environmental (park maintenance), economic (taxes), or community well-being, the government, and public officials. See Tenn. Code Ann. § 20-17-103(6)(B), (C), (D).

Exercise of the right to petition

Under Tenn. Code Ann. § 20-17-103(4),

> "Exercise of the right to petition" means a communication that falls within the protection of the United States Constitution or the Tennessee Constitution and:
>
> (A) Is intended to encourage consideration or review of an issue by a federal, state, or local legislative, executive, judicial, or other governmental body; or
>
> (B) Is intended to enlist public participation in an effort to effect consideration of an issue by a federal, state, or local legislative, executive, judicial, or other governmental body;

Here, the Court finds that the Defendants have established a prima facie case that the Plaintiffs' legal action against them is based on, relates to, or is in response to the Defendants' right to petition. Specifically, the Court finds that the Defendants have established that the

Plaintiffs have sued the Defendants for communications that were both intended to encourage consideration or review of an issue by a local legislative body and were intended to enlist public participation in an effort to effect consideration of an issue by a local legislative body. See Tenn. Code Ann. § 20-17-103(4)(A), (B).

For the above-mentioned reasons, the Court finds that the Defendants have met their burden at step one of the TPPA's dismissal analysis "of making a prima facie case that a legal action against [them] is based on, relates to, or is in response to [their] exercise of the right to free speech, right to petition, or right of association." See Tenn. Code Ann. § 20-17-105(a).

STEP 2: ANALYSIS

The Court must now move to step two of the TPPA's dismissal procedure. At step two of the TPPA's dismissal procedure, the burden shifts to the Plaintiffs to establish a prima facie case for each essential element of their claims. See *Pragnell*, 2023 WL 2985261, at *10 ("The TPPA's burden-shifting framework provides that '[i]f the petitioning party meets this burden [of 'making a prima facie case that a legal action against the petitioning party is based on, relates to, or is in response to that party's exercise of the right to free speech'], 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.'") (quoting Tenn. Code Ann. § 20-17-105(b)) (emphasis added). If the Plaintiffs fail to meet their evidentiary burden at this stage, then the Court "***shall dismiss***" the Plaintiffs' claims. See Tenn. Code Ann. § 20-17-105(b) (emphasis added).

Because only "admissible evidence" may be considered at this stage, see Tenn. Code Ann. § 20-17-105(d), the *unsworn* allegations in the Plaintiffs' Complaint cannot be considered.

Here, the Plaintiffs have not submitted any admissible evidence in support of their

invasion of privacy claims. Thus, the Plaintiffs have not established a prima facie case of any element of their invasion of privacy claims; nor have the Plaintiffs proven any damages. As a result, dismissal of the Plaintiffs' claims is required under Tenn. Code Ann. § 20-17-105(b).

As an alternative holding, given the fact that Defendant Law does not deny publishing the mobile phone numbers of the Plaintiffs on Facebook, and Defendant Osgood (Sanders) does not deny re-publishing the same post on Facebook, the Court will consider as to whether the essential elements nevertheless have been established.

"[T]o prevail on a claim for public disclosure of private facts, plaintiff[s] must show that another person gave publicity to a matter concerning their private life." *Parr v. Middle Tennessee State Univ.*, No. M1999-01442-COA-R3-CV, 1999 WL 1086451, at *3 (Tenn. Ct. App. Dec. 3, 1999)(citing *Beard v. Akzona, Inc.*, 517 F. Supp. 128, 132 (E.D. Tenn. 1981). To be actionable, a plaintiff must show that the matter disclosed is (1) highly offensive to a reasonable person and (2) not of legitimate concern to the public. *Id.*

Whether a matter would be "highly offensive to a reasonable person" is a legal determination. *Loftis v. Rayburn*, No. M2017-01502-COA-R3-CV, 2018 WL1895842, at *8 (Tenn. Ct. App. Apr. 20, 2018) (holding, as a matter of law on motion to dismiss, that "[w]e do not ... believe that the statements can be considered 'highly offensive to a reasonable person'").

The Court will note that all times relevant to their Complaint, the "Plaintiffs have served as Aldermen for the City of Fayetteville Board of Aldermen." *See Pls.' Compl.* ¶7. On May 17, 2023, Defendant Jon Law made a post on Facebook in which he "urged the citizens of the City of Fayetteville to either call or send a text message to the City's Aldermen to warn these individuals that the citizens of Fayetteville would not be paying for what Defendant Law called the Aldermen's "four years of city's operational and fiscal mismanagement and increases in

long term debt." *See id* ¶8. In that post, "Defendant Law published the names of each of the Plaintiffs in this matter including their personal mobile phone numbers." *Id.*

"On or about June 1, 2023, Defendant Tina Towry Osgood [sic] made a post on her Facebook account where she complained that no one can see the sign at the Don Davidson [public] Park." *See id* ¶9. "In that same post, Defendant Osgood [sic] published the names of each of the Plaintiffs in this matter including their personal mobile phone numbers." *Id.*

"As a direct and proximate result of the public disclosure by Defendants of Plaintiffs' personal and private mobile phone numbers," the Plaintiffs claim that they "have suffered severe mental anguish, emotional distress, worry, and embarrassment." *Id at* ¶13. As a result, the Plaintiffs demand "[a]n award of compensatory damages ... in the amount of Seven Hundred Fifty Thousand Dollars ($750,000.00)." *Id. at* ¶A.. The Plaintiffs also seek a further award of punitive damages, expenses, and attorney fees. *Id. at* ¶B-C.

In consideration of the first element, the Plaintiffs insist that "[t]he distribution and dissemination of Plaintiffs' personal mobile phone numbers concern private matters of a kind that would be highly offensive to a reasonable person when publicized and which are not of legitimate concern to the public." See id.

The "private matters" publicized in this cause are the personal mobile telephone numbers of the Plaintiffs. Prior to the proliferation of mobile telephones, when an individual desired to find someone's "landline" telephone number, one could simply locate such information within the "phonebook" which was delivered in physical form to virtually every household and place of business. Not only did these phonebooks contain the telephone numbers of each household which maintained a telephone, the home address for that physical location would also listed within the publication. In addition to being mailed/delivered to each household, these

phonebooks would also be routinely attached to "payphone booths" in order that they might be utilized by the general public. Clearly, as time passed and "landlines" became less used by the general public, these publications were disseminated less frequently, and such physical publications are now centered around commercial advertisements (i.e. the *Yellowpages*).

Today, this same information may be found online, utilizing the services of "*whitepages.com*" as mentioned by Mr. Law. This service can link a name with their cell phone number, address, and other public personal information.

As such, under the backdrop of this case, the Court is constrained to find that such publication does not arise to the level of "*highly* offensive" and therefore actionable given that Plaintiffs voluntarily previously published their mobile phone numbers to the public. Specifically, two of the Plaintiffs published their own personal mobile phone numbers on their public-record nominating petitions and then circulated those petitions to members of their community to sign. See Ex. 1, State of Tennessee Candidate Nominating Petition [for] Municipal Candidate Tonya Allen, at 1 ("Tonya Allen ...931-625-1688"); Ex. 2, State of Tennessee Candidate Nominating Petition [for] Municipal Candidate Roger Martinez, at 1 ("Roger Martinez ...256-658-4303"). Plaintiff Martinez has also published his own mobile phone number online in a recent advertisement for the sale of a Honda CRV, in which he stated: "Here's a 2016 Honda CRV EX owner clean car fax ask for Roger and you can purchase this one for only $19,900 but remember you must come see Roger at that price call text or email. 256-658-4303[.]" See Ex. 3, Cars for Sale, ClassicCarsBay.com, at 2.

Also, on September 28, 2022, the Fayetteville Regional Planning Commission published the contact information of its members, including Plaintiff Dorothy Small. Included on the document is Ms. Small's mobile phone number, home phone number,

address, and email. See Ex. 8. The mobile phone number matches the mobile phone number the Plaintiffs' complaint has charged Defendants with publishing. Ex. 8 appears to have been received in response to a "open records request", and same was provided by the City of Fayetteville.

In addition, as shown in the affidavit submitted by Ms. Donna Hartman (see the Declaration of Donna Hartman (Ex. 5)), Plaintiffs each used their cell phones for city business and this information was made known to Mr. Law before publication of such numbers. According to Mr. Law's affidavit, (Declaration of Defendant Jon Law (Ex. 4)) Mr. Law assembled the Plaintiffs' cell phone numbers from his time as mayor and from searches on the website www.whitepages.com, a subscription service that is available to any member of the public.

Therefore, publishing someone's cell phone number *in the context of this case* is not *highly* offensive to any reasonable person given that the Plaintiffs in this case have themselves published and disseminated their cell phone numbers publicly. As a result, the claims of Plaintiff must fail as a matter of law.

STEP 3: DEFENSES

Although the Court finds that the case should be dismissed as a matter of law at Step 2, the Court will also consider "whether Defendants [have] 'establish[ed] a valid defense to the claims in the legal action.'" *Pragnell*, 2023 WL 2985261, at *12 (quoting Tenn. Code Ann. § 20-17-105(c)). If the Defendants have established a valid defense to the Plaintiffs' claims, then the Court "shall dismiss" the Plaintiffs' claims. See Tenn. Code Ann. § 20-17-105(c) ("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.").

1. Failure to State a Claim Defense

As previously mentioned, "to prevail on a claim for public disclosure of private facts, plaintiff[s] must show that another person gave publicity to a matter concerning [their] private life." *Parr v. Middle Tennessee State Univ.*, No. M1999-01442-COA-R3-CV, 1999 WL 1086451, at *3 (Tenn. Ct. App. Dec. 3, 1999) (citing *Beard v. Akzona, Inc.*, 517 F. Supp. 128, 132 (E.D. Tenn. 1981)). To be actionable, a plaintiff "must show that the matter disclosed is both [1] highly offensive to a reasonable person and [2] not of legitimate concern to the public." *Id.*; see also *Jackson & Assocs., Ltd. v. Christl*, No. 01A-019103-CV-00081, 1991 WL 155687, at *3 (Tenn. Ct. App. Aug. 16, 1991) ("One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy if the matter publicized is of the kind that (a) would be highly offensive to a reasonable person and (b) is not of legitimate concern to the public.") (citing *Beard*, 517 F. Supp. at 132 (quoting Restatement (Second) of Torts Sec. 652(D)).

Here, the Court finds that the Plaintiffs are elected officials who serve on the City of Fayetteville's Board of Mayor and Aldermen. The Court further finds that the Plaintiffs have sued the Defendants for invasion of privacy based on alleged public disclosure of private facts for publicizing the Plaintiffs' mobile phone numbers on Facebook as part of a public petitioning campaign regarding matters of local governance. The publications for which the Defendants have been sued are attached to the Plaintiffs' Complaint as exhibits.

In response to the Defendants' defense that the Plaintiffs have failed to state a cognizable claim for invasion of privacy, the Plaintiffs have argued that the issue of whether publishing their cell phone numbers was "highly offensive" should be resolved according to a subjective standard. See Pls.' Resp. at 4 ("Plaintiffs submit it is up to each individual person to decide

whether publication of their cell phone is highly offensive."); *id.* at 5 (arguing that "[w]hether it is highly offensive should be left to the person with the cell phone, not the [sic] publicizing the number, to decide."). However, whether publishing a person's cell phone number "would be highly offensive to a reasonable person" is an objective inquiry, not a subjective one. See *Parr*, 1999 WL 1086451, at *3. The Plaintiffs' status as public officials is also relevant to whether a reasonable person would find the publication of the Plaintiffs' cell phone numbers offensive. See, e.g., *DeHart v. Tofte*, 326 Or. App. 720, 749, 533 P.3d 829, 847 (2023) ("Plaintiffs and defendants treat the fact that plaintiffs are public officials as a relevant circumstance in determining whether their 'severe emotional distress' was 'reasonable,' and we agree that it is a relevant circumstance. As the United States Supreme Court has observed, '[a]n individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs,' including that the individual 'runs the risk of closer public scrutiny than might otherwise be the case[.]'") (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344, 94 S. Ct. 2997, 3009, 41 L. Ed. 2d 789 (1974)).

Here, in light of the facts presented, and in light of the fact that the cell phone numbers were previously published via publicly disseminated documents, the Court finds that no reasonable person would find the publication of the Plaintiffs' cell phone numbers to be "***highly*** offensive" constituting an actionable offense. The key word is "highly" offensive. In order to be actionable, the publication must be more than just offensive, but "highly offensive" in the context of the surrounding facts. In making this determination, the Court observes that the Plaintiffs have not identified any case supporting tort liability for publishing a person's cell phone number, nor has the Court been able to locate such. Most importantly, the record also demonstrates that two of the Plaintiffs published their own cell phone numbers on their public-

candidate nominating petitions, suggesting that those Plaintiffs do not subjectively consider the publication of their cell phone numbers to be *highly* offensive.

As previously mentioned, two of the Plaintiffs published their own personal mobile phone numbers on their public-record nominating petitions and then circulated those petitions to members of their community to sign. See Ex. 1, State of Tennessee Candidate Nominating Petition [for] Municipal Candidate Tonya Allen, at 1 ("Tonya Allen ...931-625-1688"); Ex. 2, State of Tennessee Candidate Nominating Petition [for] Municipal Candidate Roger Martinez, at 1 ("Roger Martinez ...256-658-4303"). Plaintiff Martinez has also published his own mobile phone number online in a recent advertisement for the sale of a Honda CRV, in which he stated: "Here's a 2016 Honda CRV EX owner clean car fax ask for Roger and you can purchase this one for only $19,900 but remember you must come see Roger at that price call text or email. 256-658-4303[.]" See Ex. 3, Cars for Sale, ClassicCarsBay.com, at 2.

Also, on September 28, 2022, the Fayetteville Regional Planning Commission published the contact information of its members, including Plaintiff Dorothy Small. Included on the document is Ms. Small's mobile phone number, home phone number, address, and email. See Ex. 8. The mobile phone number matches the mobile phone number the Plaintiffs' complaint has charged Defendants with publishing. Ex. 8 appears to have been received in response to a "open records request," and same was provided by the City of Fayetteville.

Lastly, each of the plaintiffs in this case is a "public official," not a "private individual." See *Gertz*, 418 U.S. at 345, 94 S.Ct. 2997 (drawing distinction between "public officials" and "private individuals"). Such distinction is important to consider in determining as to whether the publication of their cell phone numbers was "*highly* offensive". The United States Supreme Court has observed, "[a]n individual who decides to seek governmental office must accept

certain necessary consequences of that involvement in public affairs," including that the individual "runs the risk of closer public scrutiny than might otherwise be the case," and has relinquished some part of their "interest in the protection of [their] own good name." *Id.* For example, "[c]ommunications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them," but "[n]o such assumption is justified with respect to a private individual." *Id.*

Therefore, under the facts of this case, the Court is constrained to find that publishing someone's cell phone number *in the context of this case* is not *highly offensive* to any reasonable person given that the Plaintiffs in this case have themselves published and disseminated their cell phone numbers publicly.

For the foregoing reasons, the Court is constrained to find that the Plaintiffs' invasion of privacy claim, based on public disclosure of private facts, fails to state a claim upon which relief can be granted; both because the Defendants' publications would not be highly offensive to a reasonable person due to the fact that Plaintiffs previously published the same information published by Defendants. See *Roberts v. Essex Microtel Assocs., II, L.P.*, 46 S.W.3d 205, 212 (Tenn. Ct. App. 2000) ("'there is no liability for the examination of a public record concerning the plaintiff, or of documents that the plaintiff is required to keep and make available for public inspection.'") (quoting Restatement (Second) of Torts § 652 B (1977)).

2. First Amendment Defense

The First Amendment, incorporated against Tennessee as part of the Fourteenth Amendment, is the supreme law of the land. See U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties

made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). Thus, Tennessee common law may not conflict with the First Amendment. See *Cadence Bank, NA. v. The Alpha Tr.*, 473 S.W.3d 756,765 (Tenn. Ct. App. 2015) ("The preemption doctrine originated in the Supremacy Clause of the United States Constitution. U.S. CONST. Art. VI, cl. 2; *BellSouth*, 972 S.W.2d at 670. Under the Supremacy Clause, if a state law conflicts with a federal law, it is "'without effect,'" *Coker v. Purdue Pharma Co.*, No. W2005–02525–COA–R3–CV, 2006 WL 3438082, at *5 (Tenn. Ct. App. Nov. 30, 2006) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992)), and therefore displaced by federal law. *BellSouth*, 972 S.W.2d at 672. In other words, it is preempted.

In *Sorrell v. IMS Health Inc.*, the U.S. Supreme Court reaffirmed "that the creation and dissemination of information are speech within the meaning of the First Amendment." 564 U.S. 552, 570 (2011) (citing *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) ("[I]f the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct" (some internal quotation marks omitted)). "Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs[,]" the *Sorrell* Court explained. *Id.*

Here, the Defendants have asserted that the First Amendment protects the right to disseminate public officials' personal contact information. As support, the Defendants cite several cases, including: *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (a United States Supreme Court decision holding that the distribution of leaflets containing a

realtor's home phone number to encourage criticism of his business practices was protected speech); *Brayshaw v. City of Tallahassee*, 709 F. Supp. 2d 1244, 1247, 1249 (N.D. Fla. 2010) (holding that truthful posting of personal information of a peace officer—including her personal address, phone number, and email—is protected by the First Amendment); *Ostergren v. Cuccinelli*, 615 F.3d at 270–290 (holding that an advocate's publication of public records containing unredacted social security numbers is protected by First Amendment); *Sheehan v. Gregoire*, 272 F. Supp. 2d 1135, 1139, n.2 (W.D. Wash. 2003) (invalidating on constitutional overbreadth and vagueness grounds statute that prohibited release of residential address, telephone number, and other personal information of law enforcement officers and court employees, and noting argument that such information can be used "to achieve service of process, research criminal history, and to 'organize an informational picket [at individual officers' homes] or other lawful forms of civic involvement to force accountability.'"); *Publius v. Boyer-Vine*, 237 F. Supp. 3d 997, 1014 (E.D. Cal. 2017) (holding that state statute that made it unlawful to post online home addresses and telephone numbers of certain government officials violated the First Amendment as applied); *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (holding that imposing damages on newspaper that published rape victim's full name gleaned from publicly-released police report violated the First Amendment). Defendants also point to the case of *DeHart v. Tofte*, 326 Or. App. 720 (holding that situation similar to the claims presented herein gave rise to anti-SLAPP liability).

In response, the Plaintiffs have not clearly identified any authority that supports their claim that the First Amendment does not protect the Defendants' publications.

Given this context, if the Plaintiffs believe that the Defendants' speech can be restricted in compliance with the First Amendment, then it is their legal burden to demonstrate how.

McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 210 (2014) Here, the Plaintiffs have failed to identify any authority that would enable them to overcome their First Amendment defense. As a result, the Court is constrained to find that the Defendants have established a valid defense to liability under the First Amendment.

The United States Supreme Court in *Cox Broadcasting Corporation, et al. v. Martin Cohn* stated "the interests in privacy fade when the information involved already appears on the public record," *id. at 494–95, 95 S.Ct. 1029.* The Court further stated that once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. As previously mentioned, the aforementioned cell phone numbers were available for public inspection since they were included on publicly disseminated documents.

3. Republication Defense

A tort claim based on public disclosure of assertedly private facts presupposes that the facts at issue are "private." See *Jackson & Assocs., Ltd.*, 1991 WL 155687, at *3 (noting that the tort addresses "publicity to a matter concerning the private life of another") (emphasis added). Here, Ms. Sanders has demonstrated that, as part of her Facebook post, she copied and pasted the phone numbers of her local government officials verbatim from an earlier public post that she saw by Defendant Jon Law, the former Mayor of Fayetteville. Thus, the Plaintiffs' cell phone numbers had already been published and disseminated publicly in the same forum when Ms. Sanders copied-and-pasted them anew as part of her own petitioning campaign. As a result, the Court finds that the information was not private, and the claims against Ms. Sanders must be dismissed.

CONCLUSION

For the foregoing reasons, the Court finds that the Plaintiffs' Complaint must be dismissed under both Tenn. Code Ann. § 20-17-105(b) and Tenn. Code Ann. § 20-17-105(c). As a result, the Plaintiffs' Complaint, and all causes of action asserted in it, shall be dismissed with prejudice. See Tenn. Code Ann. § 20-17-105(e) ("If the court dismisses a legal action pursuant to a petition filed under this chapter, the legal action or the challenged claim is dismissed with prejudice.").

In that the Court was legally required to dismiss the Plaintiffs' legal action "pursuant to a petition filed under" the TPPA, the Court is required by statute to award Defendants their court costs, reasonable attorney's fees, discretionary costs, and other expenses incurred in filing and prevailing upon the petition under the **mandatory** provisions of Tenn. Code Ann. § 20-17-107(a)(1). *See id.* ("If the court dismisses a legal action pursuant to a petition filed under this chapter, the court shall award to the petitioning party: (1) Court costs, reasonable attorney's fees, discretionary costs, and other expenses incurred in filing and prevailing upon the petition").

Therefore, the Defendants shall quantify their court costs, reasonable attorney's fees, discretionary costs, and other expenses incurred in filing and prevailing upon the petition by motion and affidavit, to which the Plaintiffs may respond in written opposition thereto. Thereafter, the Defendants' motion may be set for hearing if a hearing is needed by the Court.

The Defendants have also sought sanctions under Tenn. Code Ann. § 20-17-107(a)(2). See *id.* ("If the court dismisses a legal action pursuant to a petition filed under this chapter, the court shall award to the petitioning party: (2) Any 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."). The Court does not believe that an award of sanctions is

appropriate in this case. The Court does not find that sanctions in this case are necessary to deter repetition of the conduct by the Plaintiffs or others similarly situated.

IT IS SO ORDERED.

ENTER this the 23rd day of January, 2024.

M. Wyatt Burk, Judge
Circuit Court, Part II

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and exact copy of this Order has been served on all parties at interest in this cause via U.S. mail, postage prepaid, to the following individuals:

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This the 23 day of January, 2024.

Deputy Clerk