NO. D-1-GN-18-001842

LEONARD POZNER AND VERONIQUE DE LA ROSA *Plaintiffs*,	§ § §	IN THE DISTRICT COURT OF
V.	§ §	TRAVIS COUNTY, TEXAS
ALEX E. JONES, INFOWARS, LLC, AND FREE SPEECH SYSTEMS, LLC *Defendants*	§ § §	345th JUDICIAL DISTRICT

DEFENDANTS' MOTION TO DISMISS
UNDER THE TEXAS CITIZENS' PARTICIPATION ACT

COME NOW, Defendants Alex E. Jones, Infowars, LLC and Free Speech Systems, LLC, (collectively, the "Defendants"), and hereby file this, their Motion to Dismiss Under the Texas Citizens' Participation Act and in support thereof would respectfully show this Honorable Court as follows:

I.

INTRODUCTION

This case is not about whether or not the Sandy Hook tragedy happened, nor is this case about whether Ms. De La Rosa and Mr. Pozner suffered an unthinkable tragedy on the morning of December 14, 2012, when they lost their son during the shooting. Instead, this case is about protecting the constitutional right to free speech of all Americans.

This lawsuit is a strategic device used by Plaintiffs to silence Defendants' free speech and an attempt to hold Defendants liable for simply expressing their opinions regarding questioning the government. The goal of this lawsuit is to silence Defendants, as well as anyone else who refuses to accept what the mainstream media and government tell them, and prevent them from expressing any doubt or raising questions.

EXHIBIT 1

Since long before the tragedy at Sandy Hook, Alex Jones has been an ardent and vocal supporter of the Second Amendment to the United States Constitution. He started with a local radio program during which he voiced his opinions and comments about various news stories. None of his opinions was more forcefully given than in defense of the Second Amendment. These forceful opinions and comments provoked strong disagreement from those who did not share the same views and thus created controversy.

His audience grew in large part because people agreed with his opinions about the Second Amendment and his opinion that mainstream corporate media and liberal elected and appointed government officials had historically worked to limit gun owners' rights, sometimes deceptively, and could not be trusted to preserve the rights of gun owners under the Second Amendment. Indeed, his shared opinions were that each of his listeners should question official reports and do their own investigations and analysis.

As his audience grew, his voice became more powerful. His speech was designed and intended to enlist his audiences, as well as the public in general, to become active in their cities, states and on the national level in defense of the Second Amendment. On his shows, he sometimes associated with and broadcast opinions and comments of others who held similar views and beliefs. These associations were helpful to his efforts to enlist support for his political positions and in defense of those who attacked him in order to discredit his causes.

As will be demonstrated below, the Plaintiffs' suit is not about legally actionable defamation. Rather, this suit is only the latest in Plaintiffs' efforts to silence those who openly oppose their very public 'herculean' efforts to ban the sale of certain weapons, ammunition and accessories, to pass new laws relating to gun registration and to limit free speech,. Within their sweeping efforts to ban these weapons, they have encountered opposition to their political views

from some they refer to as conspiracy theorists. They now seek to silence Jones who they believe is among the most vocal opponents of their agenda to limit Second Amendment rights.

This suit is all about Plaintiffs' attempt to use this Court to silence Mr. Jones and prevent him from expressing his constitutional rights of association, free speech and to petition. The danger of this, of course, is that if Mr. Jones' rights are limited, it is only a matter of time when others, whose opinions and speech are more 'acceptable' than Mr. Jones', lose theirs. Indeed, restricting expression of others on the internet is the goal of the Plaintiffs.

> "At some point we're all gonna have to lose some rights so the internet can be more manageable…" *Leonard Pozner*[1]

Because this suit was designed to publicly punish Defendants and thereby chill the exercise of rights by Mr. Jones and others who are politically aligned, this is a classic "strategic lawsuit against public participation" for which the Texas legislature provides a fast and certain remedy in the Texas Citizens' Participation Act.

What the United States Supreme Court has called the "parade of horribles" that could result should Plaintiffs' lawsuit continue is unlimited. The issues presented are not, nor are they intended to be, limited to the Sandy Hook shooting. The purpose of this lawsuit is to create new Texas law that opens Texas' citizens to civil liability should they openly question the government and/or craft any type of "conspiracy theory" or differing view to that which is reported by the mainstream media.

The political debate regarding governmental "false flags," gun control and conspiracy theories form the basis of each of Plaintiffs' causes of action. Under Plaintiffs' view of this lawsuit, if a Texas citizen criticizes reports of the government or mainstream media, openly supports the Second Amendment and gun rights and/or believes and voices his or her opinion

[1] Exhibit B, David Jones Aff., at ¶31 and its attached Exhibit B-27.

with regard to any conspiracy theory, whether it's the John F. Kennedy Assassination or the September 11, 2001, terrorist attack, they open themselves up to ***defamation and civil liability*** from people who are no more than tangentially connected to the report.

This case is the very reason why the Texas Legislature enacted the Texas Citizens' Participation Act, which was to protect those who express a constitutionally protected right from being targeted with a strategic lawsuit intended to silence them. For the reasons set forth below, this Court must dismiss Plaintiffs' lawsuit in its entirety.

II.

SUMMARY

It is apparent from the face of Plaintiffs' petition and the evidence in this case that the purpose of this suit is not to recover damages from any legally actionable defamation. Instead its primary and critical purpose is to ***silence*** Mr. Jones and those like him.

Plaintiffs' expressed goals are to limit free speech, ban assault rifles, certain ammunition and accessories and to expand federal registration and background checks. In particular they seek a complete ban on the "Bushmaster" AR-15 assault rifle, high-capacity clip and its ammunition that was used at Sandy Hook. They are continuing their pursuit of that goal on multiple fronts; this suit is one of those fronts.

Plaintiffs have used their notoriety to obtain favorable broadcast and print media coverage to convince others to help their agenda. They have lobbied at the federal level to ban the gun and did not succeed. However, knowing that suits against product manufacturers have been effectively used to change business practices and restrict or eliminate distribution of products, on their second front, Plaintiffs sued the Bushmaster manufacturer in their efforts to

remove that gun from the market. Their goal is to use civil litigation to change business practices and restrict or eliminate distribution of this product.

But there is a constitutionally significant difference between using litigation to force ***products*** off the market and forcing ***speech*** off the market. This is especially true when, as here, the constitutional rights involve criticism of the government and political debate.

In this case, Plaintiffs seek to force Defendants to change business practices and restrict or eliminate distribution of Mr. Jones' "products," which are his opinions and commentaries, as well as his large internet forum for others to express theirs. If they are successful at this, they will also be successful in restricting or removing a widely used forum for others with similar political views to associate and to express their First Amendment rights and petition the government for their causes.

While Plaintiffs claim that the Defendants' speech was about and specifically directed toward them, it is clear from the context of the broadcasts and the statements themselves that Defendants' speech was in connection with questioning and criticizing the government and mainstream media and expressing the opinions held by Mr. Jones, as well as many others, that Second Amendment rights were and are under attack. Thus, the statements related to privileged criticisms of government and were part of the fierce national debate about gun control in which Plaintiffs were publicly active participants.

The terrible tragedy at Sandy Hook instantly became the center of the political gun rights debates in this country. It was a watershed moment in that national debate as activists from both sides immediately became engaged in public debates on gun issues.

These debates occurred at town halls and in the halls of state houses and Congress. Most of those debates however, were elsewhere among the general population. Among those who

became more active in those national debates was Mr. Jones, who used his broadcasts to actively defend the Second Amendment.

Whether one considers Mr. Jones' opinions as merely unbelievable conspiracy theories or as insightful commentaries, there can be no question, after reviewing the entirety of the context of each complained of statement and broadcast, that Mr. Jones was exercising his constitutional rights to associate with others of similar political views, petitioning by communicating to enlist more public participation in defending the Second Amendment and expressing his and others' free speech and opinions about second amendment rights along with the government's and media's role in that national debate.

III.

FACTUAL BACKGROUND

A. Leonard Pozner and Veronique De La Rosa

The Plaintiffs in this case, Ms. De La Rosa and Mr. Pozner, are the parents of Noah Pozner, who tragically was one of the victims of the Sandy Hook shooting. Although Plaintiffs attempt to argue that they are "private individuals and are neither public officials nor public figures," both Plaintiffs inserted themselves into the controversy surrounding the Second Amendment making both of them limited-purpose public figures. As will be detailed below, the distinction between a private individual and limited-purpose public figure is important to this Court's analysis.

1. After the Sandy Hook tragedy, both Plaintiffs inserted themselves into the political debate regarding gun control and conspiracy theories

As this Court is aware, in the aftermath of the Sandy Hook shooting, gun control debates and conspiracy theories began to spread throughout the nation regarding what was being reported

and how the government should react to such tragedy. One of the primary conspiracy theorists was a Florida Atlantic Professor named James Tracy.

Three years after the Sandy Hook tragedy and in response to Professor Tracy's theories, both Mr. Pozner and Ms. De La Rosa began a campaign against him by penning a letter to the editor of the *SunSentinel*. While mentioning the Boston bombing, the Paris terrorist attack and the San Bernardino massacre, Mr. Pozner and Ms. De La Rosa stated that "[e]ach new high-profile act of violence inspires more controversies…" More specifically, Mr. Pozner and Ms. De La Rosa targeted Professor Tracy:

> "In this piece we want to focus on someone who is chief among conspiracy theorists– Florida Atlantic University Professor James Tracy."[2]

Mr. Pozner and Ms. De La Rosa complained that Professor Tracy had caused "mainstream publicity" of his Sandy Hook theories, including his claim that "the Obama administration had staged the event to prepare the country for strict gun control measures." With more than 800 news organizations covering the story, Professor Tracy, they said, had achieved tremendous success from this exposure and has since leveraged it into a popular internet blog and radio program.[3]

Importantly, in their letter, Plaintiffs stated:

> "A plethora of conspiracies arose after Sandy Hook, but ***none received as much mainstream publicity as [Professor Tracy]***, who suggested that the shooting never occurred…"[4]

Yet, in this case, Plaintiffs are now claiming that Mr. Jones and his companies are to blame. However, this example of Mr. Pozner and Ms. De La Rosa's involvement in this political debate and controversy is not limited to Professor Tracy alone.

[2] Exhibit B-5
[3] Exhibit B-5
[4] Exhibit B-5

a. Leonard Pozner

Mr. Pozner decided to dedicate his life to defending his son's honor and existence after Sandy Hook. In response to Sandy Hook conspiracy theorists, Mr. Pozner launched the internet website www.honr.com in order to stop "hoaxers." His mission is to "force hoaxers into alternative avenues to express these extreme and harmful ideas."[5] This "fight… has become his life's work."[6] Mr. Pozner posts news articles on his website titled "How to fight conspiracy theories," "Truthers: When conspiracy meets reality," and many others.[7] In fact, the front page of his website states as follows:

> "We bring awareness to the cruelty and criminality of abusive activity that victims and their families are shockingly subjected to following violent mass tragedies like Sandy Hook. We refer to those who wittingly and publicly defame, harass, and emotionally abuse victims of high-profile mass tragedies as 'hoaxers,' due to their irrational belief that these tragedies are government-staged hoaxes, and their victims are paid crisis actors.
>
> Existing laws make it very difficult and costly to prosecute hoaxers, which only emboldens them to spread defamation and disinformation, as well as employ intrusive and threatening behavior with relative impunity. We are working toward affecting positive changes to existing law as well as the creation of new legislation, so that society can hold these abusers personally accountable for their actions, providing much-needed relief to the victims and their families."[8]

Another one of Mr. Pozner's news articles is titled "Sandy Hook dad battles nearly five years after Newtown massacre: I'm not the type to turn a blind eye." In that article, Mr. Pozner, referring to his own public participation and personal crusade against conspiracy theorists and doubters, states:

> "This is ***my battle***…"[9]

[5] Exhibit B-1
[6] Exhibit B-24
[7] Exhibit B-2
[8] Exhibit B-1
[9] Exhibit B-3

Mr. Pozner also spent $30,000 in pursung his lawsuit against Wolfgang Halbig who, according to Mr. Pozner, "is a ***main champion*** of the [Sandy Hooks conspiracy theory]."[10] Mr. Pozner's "online crusade" is described as "aggressive"[11] and ferocious. Mr. Pozner's dedication to his crusade extends to his volunteers who "actively hunt down [conspiracy theory content] on a near daily basis."[12] Yet, Mr. Pozner's and his volunteers' efforts are not limited to Sandy Hook, as his organization actively assists in fighting conspiracy theorists in other tragedies. Mr. Pozner intends to stop "social media platforms" that "give voice to people who don't think this in a healthy way."[13] In other words, Mr. Pozner simply wants to silence people like Jones.

Another news article that Mr. Pozner posted on his website is entitled "Sandy Hook father Leonard Pozner on death threats: I never imagined I'd have to fight for my child's legacy." In the article he discussed how "[n]ot even Batman could have stopped an AR-15," further establishing his presence in the gun control debate. Mr. Pozner also added that he watched Mr. Jones' broadcasts and liked him because Mr. Jones "appears to think out of the box" and is "entertaining." After all, Mr. Pozner "used to be into conspiracy theories."

However, the Sandy Hook tragedy transformed Mr. Pozner's personal beliefs and now he seeks to impute liability on all those who choose to believe differently. Referring to the proliferation of websites and conspiracy theorists, Mr. Pozner said, "[i]t's like a brushfire: you need to shape it and direct it. But if you leave it alone, it will burn down your forest, and it has reached all the way to the Whitehouse." Mr. Pozner has been trying to "shape the brushfire" since 2014.[14]

[10] Exhibit B-3
[11] Exhibit B-3
[12] Exhibit B-3
[13] Exhibit B-3
[14] Exhibit B-4

Using his experience in information technology, Mr. Pozner has scrubbed internet content, filed copyright claims, sued hoaxers and successfully petitioned a university in Florida to fire a professor who Mr. Pozner believed to be a "hoaxer."[15] Likewise, Mr. Pozner has given numerous interviews on major news networks regarding his participation in fighting these "hoaxers."

[16]

Due to his participation in the national gun control debate, a recent google search of his name associated with "gun control" yielded nearly 40,000 articles.[17]

b. Veronique De La Rosa

Likewise, after the Sandy Hook tragedy, Ms. De La Rosa entered the national and very public debate over gun control. On January 18, 2013, she addressed the Connecticut General Assembly in her attempts to ban certain weapons and said, "[t]he only way I feel I can bring some purpose to [her son's death] is by speaking on the issue of gun control."[18]

[15] Exhibit B-4
[16] Exhibit B-28
[17] Exhibit B, at ¶30
[18] Exhibit B-25

[19]

Then, on February 14, 2013, Ms. De La Rosa spoke publicly at a rally outside of the Connecticut State Capital Building. Standing beside large signs demanding safer, rational gun laws, she told the crowd:

> "Assault weapons should be comprehensibly banned in the state of Connecticut… They have no place in the hands of civilians… Citizens may have the right to bear arms but they do not have the right to bear weapons of mass destruction."[20]

[21]

An article entitled, "After Newtown, Why No Progress on Guns?" was posted on the Newtown Action Alliance's Facebook page on November 12, 2013.[22] The "read more" link on

[19] Exhibit B-29
[20] Exhibit B-26
[21] Exhibit B-30

that article takes the reader to www.forward.com, where the reader can search the word "Pozner"[23] and find Ms. De La Rosa's "profile" among multiple articles about her.

According to her profile, Ms. De La Rosa became "one of the most vocal Newtown parents giving interviews with CNN's Anderson Cooper and…with People Magazine"[24] and her words influenced and "resonated" with Connecticut's legislature as it later "passed the strictest gun control laws in the nation…"[25] In fact, Ms. De La Rosa's profile openly acknowledges the fact that she is no longer simply a private individual as she claims to be in this lawsuit:

> "Before Newtown, [Ms. De La Rosa] was private citizen leading a quiet life as an oncology nurse and mother. On December 14, 2012, she was involuntarily thrust into the limelight. ***But rather than shy away from the media onslaught***, [Ms. De La Rosa] made the ***Herculean effort***, as Rabbi Praver said, of communicating her grief to the public. In so doing, ***she kept Newtown and gun control on the national agenda***."[26]

According to an article in *Business Insider* in January 2013, Ms. De La Rosa and her family submitted a detailed proposal to a White House task force recommending a range of legal reforms relating to guns.[27] She also appeared and testified before the Connecticut panel on gun control in Hartford. A full text of her remarks reflects her publicly shared opinions that "…assault weapons should be comprehensibly banned" as "tools of mass carnage…such weapons have no place in our society."

Ms. De La Rosa also called for mandatory surrender of all newly illegal firearms and full registration of all guns as well as a "substantial tax" on all ammunition. Clearly, Ms. De La Rosa is fully and voluntarily engaged in a contentious and widespread national debate over guns.[28]

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[22] Exhibit B-6
[23] Ms. De La Rosa is the ex-wife of Mr. Pozner. In many of the articles she is referred to as Mrs. Pozner.
[24] Exhibit B-7
[25] Exhibit B-7
[26] Exhibit B-7 (emphasis added)
[27] Exhibit B-8
[28] Exhibit B-9

Her public participation in the gun rights debate is well known as a google search of the term "Veronique Pozner gun control" resulted in 580,000 articles.[29]

Mr. Pozner and Ms. De La Rosa remain publicly active in the national gun control debate as they have joined other families in suing the City of Newtown[30] and filed an *amicus* brief in a case seeking to force Wal-Mart to stop selling assault rifles.[31]

They also filed suit against the maker of the firearm used to kill their child.[32] The suit, styled *Soto v. Bushmaster Firearms International LLC*, garnered wide attention and prompted those with differing views in the national gun debate to respond[33] and was intended to "provide a roadmap to success in court for other victims of mass shootings…"[34]

Plaintiffs' suit against the manufacturer continues to command national attention as reported by *CBS This Morning* on November 14, 2017.[35] After a lower court dismissed their case citing a federal law granting broad immunity to arms manufacturers, Plaintiffs appealed the decision to further their efforts to push for gun-control and keep the political debate surrounding the issue in the public view.[36] Predictably, the National Rifle Association, along with the Connecticut Citizens Defense League,[37] is involved in protecting this federal law.[38]

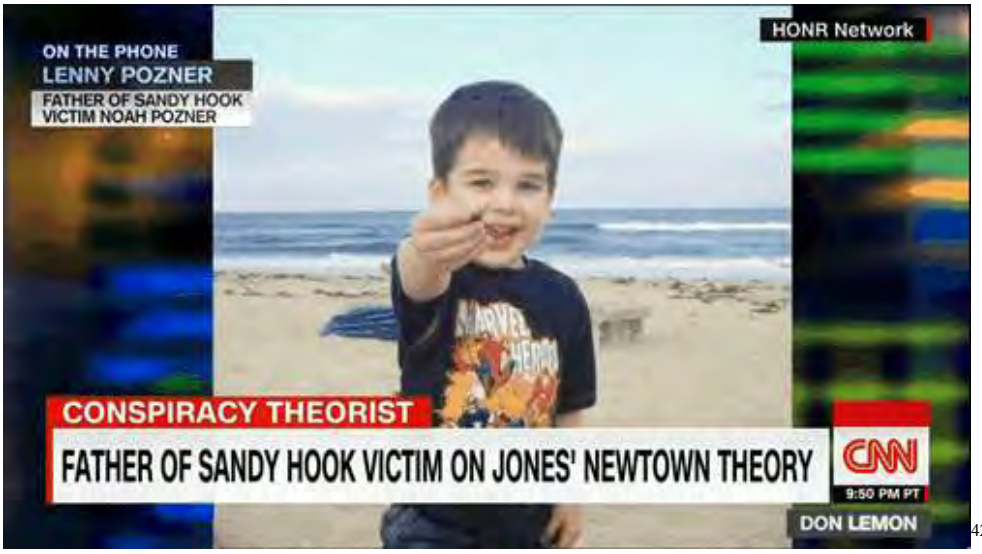
Plaintiffs' Bushmaster lawsuit suit was and is widely recognized as not just being about the Plaintiffs' injuries. Instead, Plaintiffs' Bushmaster lawsuit affected how– ***and if***– Remington

[29] Exhibit B, ¶30
[30] Exhibits B-10, B-11 and B-12
[31] *See Trinity Wall St. v. Wal-Mart Stores, Inc*., 792 F. 3d 323 (3rd Cir. 2015)
[32] Exhibit B-13
[33] Exhibit B-15
[34] Exhibit B-14
[35] Exhibit B-16
[36] Exhibit B-17
[37] Exhibit B-19
[38] Exhibit B-18

would do business in the future.[39] Remington Firearms, the maker of the rifle used at Sandy Hook recently filed for bankruptcy.[40]

Then, after filing this suit, Plaintiffs publicized it in their efforts to influence public opinion.

[41]



[42]

Clearly, contrary to their claims, Plaintiffs are not simply "private individuals."

[39] Exhibit B-20
[40] Exhibit B-17
[41] Exhibit B-32
[42] Exhibit B-33

B. This Lawsuit

Plaintiffs filed the instant lawsuit on April 16, 2018, against Mr. Jones and his companies, Infowars, LLC and Free Speech Systems, LLC.[43] The claims in the lawsuit are based entirely on certain commentary and statements made by Mr. Jones in broadcasts in April and June 2017 (the "Broadcasts"). Further, Plaintiffs allege that broadcasts on April 22, 2017, April 28, 2017 and June 18, 2017, in their entirety, are false and defamatory.[44]

1. April 22, 2017

In the April 22 broadcast, Mr. Jones opines on how the "corporate media" cannot be trusted because they have propagated what he considers to be false information about significant public events. In support of his opinions, Mr. Jones cites and refers to the reporting on the use of weapons of mass destruction (WMDs), which led to the Iraq war as an example, along with several others, including what he described as the use of a "blue" or "green" screens (hereafter referred to as a "blue screen") by CNN during a live interview conducted by Anderson Cooper regarding the Sandy Hook shooting.

In the specific instance complained of by the Plaintiffs in this lawsuit, Anderson Cooper's nose temporarily disappears in the video as he turns his head, which Mr. Jones argues is evidence of technical glitches that often occur when using a blue screen. Mr. Jones concluded that, in his opinion, CNN's use of the blue screen signifies that CNN was misrepresenting or faking the actual location of the interview, just as he believed they had been caught doing and admitted to in the past.

[43] Infowars is owned and operated by Defendant Free Speech Systems, LLC.
[44] Plaintiffs' Original Petition, at ¶62 and ¶63

Despite the fact that Ms. De La Rosa participated in this original interview with Anderson Cooper,[45] she only appears briefly in the video upon which Mr. Jones is commentating and his commentary focuses entirely on and is specifically directed toward CNN, not Ms. De La Rosa.

Mr. Pozner is neither shown, mentioned, referenced nor identified in any way during any of the alleged defamatory statements and broadcast on April 22, 2017. The same is true for all of Plaintiffs' claims regarding the alleged defamatory meaning behind each of the referenced instances of Mr. Jones' comments regarding CNN's possible use of blue screens.

The title of the April 22, 2017 broadcast upon which Plaintiffs base one of their claims was "Breaking: Sandy Hook Vampires Exposed." In the video, Mr. Jones specifically and explicitly explained that the reference to "vampires" in the title of the segment refers to the corporate media. Yet, despite this explanation, Plaintiffs nevertheless wrongly claim that they themselves were referred to as the "Sandy Hook Vampires."[46]

Mr. Jones further explains that certain comments that he had previously made in connection with possible faking or staging events at the Sandy Hook shooting was not an accusation against the children or families, but against the media and government officials, whose actions led many to question the official version of the event. Despite all of these explanations by Mr. Jones, Plaintiffs isolate specific statements, take them out of context while ignoring other relevant portions, and misinterpret what was said.

2. April 28, 2017

The April 28 broadcast was video from a press conference that Mr. Jones held regarding his child custody case. During the 30-minute conference, he was briefly asked about Sandy

[45] Plaintiffs' Original Petition, at ¶13
[46] Plaintiffs' Original Petition, at ¶22

Hook. In response, Mr. Jones discusses how he played "devil's advocate" in the debate, but he does not mention or reference either Plaintiff, nor does he insinuate that the Plaintiffs or any parents of Sandy Hook victims engaged in any wrong doing. Likewise, Mr. Jones again provides his opinion and explains that he "think[s] we should investigate everything because ***the government*** has staged so much stuff…"[47] Yet again, the so-called defamatory statement was referenced in connection with Mr. Jones' opinions in connection with ***the government***, not the Plaintiffs.

3. June 18, 2017

The June 18 broadcast was an interview of Mr. Jones by Megyn Kelly on NBC on that date.[48] Despite the fact that Ms. Kelly interviewed and questioned Mr. Jones for more than 10 hours throughout the day on June 18, 2017, NBC and Ms. Kelly aired less than 18 minutes of the actual interview.[49] The portion of Mr. Jones' interview that was aired was taken out of context and edited by NBC and Ms. Kelly in an effort to increase their ratings.[50] What was taken out of context and portrayed by NBC and Ms. Kelly cannot be imputed to Mr. Jones or Defendants.

Regardless, in the portion aired by NBC, Ms. Kelly questioned Mr. Jones about the Sandy Hook shooting, but Mr. Jones does not mention or otherwise refer to either Plaintiff, nor does he make any statements insinuating wrongdoing by any of the parents of Sandy Hook victims. In fact, there is nothing said by Mr. Jones during the interview that could possibly be considered defamatory toward the Plaintiffs in any manner.

[47] Plaintiffs' Original Petition, at ¶23
[48] Plaintiffs' Original Petition, at ¶25, footnote 14
[49] Exhibit A, Alex Jones Aff., at ¶2
[50] Exhibit A, Alex Jones Aff., at ¶2

C. Irrelevant broadcasts

In an attempt to distract this Court from what the true issues in this lawsuit are (i.e., whether the April 22, April 28 and June 18, 2017, broadcasts are defamatory in and of themselves), Plaintiffs' Original Petition also references broadcasts on June 13, 2017 and June 26, 2017.[51] In the June 13 broadcast, Mr. Jones merely mentions the word "blue screen" without any reference to either Plaintiff.[52] The June 26 broadcast concerns commentary by Infowars employee Owen Shroyer based on an article that was published by the online publication Zero Hedge.[53] The article referenced inconsistencies in the June 18 broadcast by Megyn Kelly on NBC, but the broadcast does not mention or otherwise concern, directly or indirectly, either Plaintiff. None of these facts are legally or factually relevant to any of Plaintiffs' causes of action and should be ignored by this Court.

Further, Plaintiffs' Original Petition also references a number of older broadcasts, well before the expiration of the one-year statute of limitations for defamation in Texas.[54] Again, none of these broadcasts has any relevance to whether the April 22, April 28 and June 18 broadcasts, ***in and of themselves***, are defamatory. This Court's focus ***must remain*** on the broadcasts that Plaintiffs claim are defamatory.

Plaintiffs' goal in this litigation is to "revive" statements made that fall outside of the statute of limitations by claiming that the actual statements and broadcasts that are subject to this lawsuit are simply a "continuation" of a pattern of alleged falsities. However, no matter how Plaintiffs' argument is crafted, old statements cannot be "revived."

[51] Plaintiffs' Original Petition, at ¶62-67
[52] Plaintiffs' Original Petition, at ¶24, footnote 13
[53] Plaintiffs' Original Petition, at ¶29, footnote19
[54] Plaintiffs' Original Petition, at ¶60-75

IV.

THE IMPORTANCE OF THE FIRST AMENDMENT

> "At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. The freedom to speak one's mind is not only an aspect of individual liberty- and thus a good unto itself- but also is essential to the common quest for truth and the vitality of society as a whole… ***The First Amendment recognizes no such thing as a 'false' idea.***"[55]

"[B]oth the U.S. Constitution and the Texas Constitution robustly protect freedom of speech."[56] The United States Constitution's protections for speech were "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[57] As the United States Supreme Court has emphasized:

> "The right to think is the beginning of freedom, and ***speech must be protected***… because speech is the beginning of thought."[58]

Likewise:

> "The Texas Constitution also explicitly protects freedom of expression, declaring that '[e]very person shall be at liberty to speak, write or publish his opinions on any subject… and no law shall ever be passed curtailing the liberty of speech or of the press."[59]

"Protections for the press are ***especially vital*** because of the ***pivotal role*** it plays in the dissemination of information to the public."[60] Thus, a "free press" is "essential to a healthy democracy."[61] Similarly, one of the "foundational principles of American democracy is the

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[55] *Hustler Magazine v. Falwell*, 485 U.S. 46, 50-51 (1988) (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-504 (1984) (emphasis added)).
[56] *D Magazine Partners, L.P.*, 529 S.W.3d at 431
[57] *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 433 (Tex. 2017) (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)
[58] *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002) (emphasis added)
[59] *D Magazine Partners, L.P.*, 529 S.W.3d at 433 (citing Tex. Const. art. I §8)
[60] *D Magazine Partners, L.P.*, 529 S.W.3d at 433 (citing *N.Y. Times Co. v. United States*, 403 U.S. 713, 717, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971) (Black, J., concurring) (emphasis added).
[61] *D Magazine Partners, L.P.*, 529 S.W.3d at 431

freedom to comment on matters of public concern."[62] This "foundational principle" has been repeatedly emphasized by the United States Supreme Court.

In *New York Times Co. v. Sullivan*[63], the Court expressed "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open and that [such debate] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government…"[64]

The Court in *Rosenblatt v. Baer*[65] took this viewpoint even further:

> "***Criticism of government*** is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, les criticism of government itself be penalized."[66]

These "foundational principles" are equally protected by Texas law and fall within the purview of the TCPA.[67]

V.

THE TEXAS CITIZENS' PARTICIPATION ACT

A. <u>The Purpose of the TCPA</u>

The TCPA "protects citizens who… speak on matters of public concern from retaliatory lawsuits that seek to intimidate or silence them"[68] and "professes an overarching purpose of 'safeguard[ing] the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government" against infringement by meritless lawsuits, and is often

[62] *D Magazine Partners, L.P.*, 529 S.W.3d at 433
[63] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)
[64] *New York Times Co.*, 376 U.S. at 270
[65] *Rosenblatt v. Baer*, 383 U.S. 75, 85, 15 L. Ed. 2d 597, 86 S. Ct. 669 (1966)
[66] *Rosenblatt*, 383 U.S. at 85 (emphasis added)
[67] *Hersh v. Tatum*, 526 S.W.3d 462, 466 (Tex. 2017) ("The stated purpose of the [TCPA] is to 'encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law..."); *see also Foster v. Laredo Newspapers*, 541 S.W.2d 809, 812 (Tex. 1976) (quoting *Rosenblatt*, 383 U.S. at 85) ("Criticism of government is at the very center of the constitutionally protected area of free discussion…").
[68] *In re Lipsky*, 460 S.W.3d 579, 579 (Tex. 2015) (citing Tex. Civ. Prac. & Rem. Code §27.001-011)

characterized as an "anti-SLAPP" law.[69] The TCPA further directs that it is to be "construed liberally to effectuate its purpose and intent fully"[70] and it pursues "any such goals chiefly by defining a suspect class of legal proceedings that are deemed to implicate free expression, making these proceedings subject to threshold testing of potential merit, and compelling rapid dismissal- with mandatory cost-shifting and sanctions- for any found wanting."[71]

The Texas Supreme Court in *Adams v. Starside Custom Builders, LLC*[72], recently stated that "[t]he TCPA casts a wide net."[73] In fact, the Honorable Bob Pemberton wrote:

> "It is conceivable that the Legislature would see fit to ***cast this net exceptionally widely- opting for a hand grenade rather than a rifle shot-*** perhaps in recognition of a ***high value being ascribed to constitutionally-protected expression*** that may be subsumed somewhere within the Act's definitions of protected expression, or in an effort to capture expression-targeting 'legal actions' that might otherwise be creatively pleaded so as to avoid the statute's requirements."[74]

Under the TCPA, the movant bears the initial burden to show by a preponderance of evidence "that the legal action[75] is based on, relates to, or is in response to the party's exercise of" certain constitutional rights.[76] This first step of the TCPA is a legal question[77] and in determining whether "a legal action should be dismissed… the court ***shall consider the pleadings*** and supporting and opposing affidavits stating the facts on which the liability… is based."[78]

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[69] *Cavin v. Abbott*, 2017 Tex. App. LEXIS 6511, *16 (Tex. App.- Austin, July 14, 2017) (emphasis added)
[70] *Cavin*, 2017 Tex. App. LEXIS 6511, at *16
[71] *Cavin*, 2017 Tex. App. LEXIS 6511, at *16
[72] *Adams v. Starside Custom Builders, LLC*, No. 16-0786, 2018 Tex. LEXIS 327, at *8 (Tex. 2018)
[73] *Adams*, 2018 Tex. LEXIS 327, at *8
[74] *Cavin v. Abbott*, 2017 Tex. App. LEXIS 6511, *42 (Tex. App.- Austin, July 14, 2017) (emphasis added).
[75] Pursuant to the statute, a "legal action" can be, among others, a "lawsuit" or "cause of action." Tex. Civ. Prac. & Rem. Code §27.001(6).
[76] Tex. Civ. Prac. & Rem. Code §27.005(b)
[77] *Whisenhunt v. Lippincott*, 416 S.W.3d 689, 695 (Tex. 2013); *Epperson v. Mueller*, No. 01-15-00231-CV, 2016 Tex. App. LEXIS 8671 (Tex. App.-Houston [1st Dist.] Aug. 11, 2016)
[78] *Hersh*, 526 S.W.3d at 466 (emphasis added); Tex. Civ. Prac. & Rem. Code §27.006(a)

Once the movant meets this evidentiary burden and proves that the TCPA applies, the burden shifts to the nonmovant to establish "by clear and specific evidence a prima facie case for each essential element of the claim in question" in order to avoid dismissal.[79]

Should the nonmovant meet its statutory burden, the burden shifts back to the movant, who may then establish by a preponderance of the evidence each essential element of a valid defense which, if established, results in a mandatory dismissal by the court.[80]

VI.

ARGUMENT AND AUTHORITIES

A. Plaintiffs' "legal action" is based on, related to and in response to Defendants' exercise of the Right to Free Speech, Right to Petition and Right of Association

The TCPA is applicable to this litigation because: (1) Plaintiffs' legal action is factually predicated on Defendants' exercise of their constitutionally protected rights; and (2) Plaintiffs' legal action is otherwise "based on, relates to and is in response to" Defendants' exercise of their constitutionally protected rights.

1. Plaintiffs' legal action is factually predicated on Defendants' exercise of their constitutionally protected rights

The Austin Court of Appeals has long held that the TCPA's language, "based on, relates to, or is in response to" "serves to capture, at a minimum, a 'legal action' that is factually predicated upon alleged conduct that would fall within the TCPA's definitions of 'exercise of the right of free speech…"[81] The term "legal action" is defined by the TCPA, among others, as a "lawsuit" or "cause of action."[82] In this case, Plaintiffs' entire "lawsuit," as well as each

[79] Tex. Civ. Prac. & Rem. Code §27.005(c)
[80] Tex. Civ. Prac. & Rem. Code §27.005(d) ("the court shall dismiss…")
[81] *Cavin*, 2017 Tex. App. LEXIS 6511, at *20
[82] Tex. Civ. Prac. & Rem. Code §27.001(6)

individual "cause of action," is factually predicated upon Defendants' exercise of their constitutionally protected rights.

As stated above, when making the determination whether a "legal action" is based on, related to or in response to a movant's constitutionally protected right, the Texas Supreme Court has observed and stated that:

> "'[T]he ***plaintiff's petition***…, as so often has been said, is the 'best and all sufficient evidence of the nature of the action'…When it is ***clear from the plaintiff's pleadings*** that the action is covered by the [TCPA], ***the defendant need show no more***."[83]

a. Right to Free Speech, Right of Association and Right to Petition

The TCPA defines the "exercise of the right of free speech" as "a communication made in connection with a matter of public concern,"[84] which "includes [among others] an issue related to… health or safety… community well-being… [or] the government."[85] Courts have broadly interpreted the TCPA's application to "matters of public concern"[86] which, by plain language of the statute, includes an issue related to health or safety; environmental, economic, or community well-being; the government; a public official or public figure; or a good, product, or service in the marketplace.[87] The Third Court of Appeals has explained:

> "[T]he TCPA does not require that the statements specifically "mention" health, safety, environmental, or economic concerns, nor does it require more than a "tangential relationship" to the same; rather, TCPA applicability requires only that the defendant's statements are "in connection with" "issue[s] related to"

[83] *Hersh*, 526 S.W.3d at 467
[84] *Hersh*, 526 S.W.3d at 466
[85] *Hersh*, 526 S.W.3d at 466; Tex. Civ. Prac. & Rem. Code §27.001(7)(A-E).
[86] *See, e.g., Adams*, 2018 Tex. LEXIS 327 at *10 (observing that communications by a resident that real estate developer had "chopped down trees, generally made life miserable for the residents, and engaged in unspecified other corrupt or criminal activity is of public concern"); *David Martin Camp v. Patterson*, 2017 Tex. App. LEXIS 7258, at *14 (Tex. App.- Austin 2017, no pet.) (holding that private texts and emails of contractor related to goods or products in the marketplace were "matters of public concern"); *Warner Bros. Entm't, Inc. v. Jones*, 538 S.W.3d 781, 798 (Tex. App.- Austin 2017, pet. filed) (statements that former football player tried to hire a hit man to kill his agent were a "matter of public concern" because they concerned the safety of the agent).
[87] Tex. Civ. Prac. & Rem. Code §27.001(7)(A-E)

> health, safety, environmental, economic, and other identified matters of public concern chosen by the Legislature."[88]

The TCPA defines the exercise of the "right to petition" as, among others: (i) a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body[89]; (ii) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body[90]; and/or (iii) a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body.[91] "Communication" is defined as the making or submitting of a statement or video in any form or medium, including oral, visual, written, audiovisual, or electronic.[92] "Right of Association" within the TCPA means a "communication between individuals who join together to collectively express, promote, pursue, or defend common interests."[93]

As is apparent from Plaintiffs' Original Petition, each cause of action against Defendants, arising out of statements and broadcasts from April 22, 2017, April 28, 2017, and June 18, 2017, is based on, relates to and is response to Defendants' exercise of their right of free speech, right of association and right to petition. From Plaintiffs' Original Petition, it appears as though they are claiming that certain statements in and of themselves are defamatory and, at the same time, arguing that the broadcasts in their entirety are defamatory. Neither is true.

Importantly, for purposes of efficiency, Defendants contend and believe that each statement and broadcast not only constitute an expression of free speech, but also fall within the TCPA's definitions of the right to petition and right of association. All of the statements and

[88] *Cavin v. Abbott*, 2017 Tex. App. LEXIS 6511, at *28 (Tex. App.- Austin July 14, 2017, no pet.) (citing *Exxon v. Coleman*, 512 S.W.3d 895 (Tex. 2017)
[89] Tex. Civ. Prac. & Rem. Code §27.001(4)(B)
[90] Tex. Civ. Prac. & Rem. Code §27.001(4)(C)
[91] Tex. Civ. Prac. & Rem. Code §27.001(4)(D)
[92] Tex. Civ. Prac. & Rem. Code §27.001(1)
[93] Tex. Civ. Prac. & Rem. Code §27.001(2)

broadcasts were communications between individuals, Mr. Jones and his listeners, who join together to collectively express, promote, pursue, or defend common interests. Further, the subject matter upon which Mr. Jones' statements and broadcasts were made (i.e., questioning the mainstream media and governmental reports) likewise constitute communications that were reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body.[94]

In order to prevent repetition regarding each statement and/or broadcast falling into the category of "free speech," "right of association," or "right to petition," Defendants will provide the analysis of free speech, but also believe that the "free speech" upon which Plaintiffs have based their lawsuits likewise constitute Mr. Jones' "right of association" and "right to petition" as defined by the TCPA.[95]

[94] Unlike the right of free speech under the TCPA, the exercise of the right of association and right to petition need not involve a matter of public concern. The right of association and right to petition under the TCPA include not only the right to directly petition the government for action but also the sorts of collateral actions aimed at influencing public opinion in support of petitioning the government, as well as associating with individuals to promote and defend common interests. *Serafine v. Blunt*, 466 SW 3d 352, 381 (Tex. App.- Austin 2015, no pet.). The "collateral actions" used by Mr. Jones are his speech, commentary and large forum to express his own and others' views urging the public to resist attempts to ban rifles and ammunition. All of the statements alleged to be defamatory in the April 22 broadcast including describing the flowers and leaves looking fake, the portion of Anderson Cooper's nose disappearing, the previous false use of blue screens by CNN, the prior claims of the government about WMD's in Iraq, the allowance by our government of the "Arab Spring" and the resulting fall of governments friendly to the US and the US allowing attacks on Serbia along with Mr. Jones' opinions about other reports and videos were communications "reasonably likely to enlist public participation" in an effort to petition government to not adopt restrictive gun laws and to adopt additional rights for gun owners. Further Mr. Jones reminded his viewers not to be "Dory" and forget about what he believed to be historical facts of deception in order to justify limiting gun owners' rights. His brief statements criticizing the government in the April 28 news conference were reasonably likely to enlist and encourage others to question and individually investigate official reports by government officials and mainstream media and not to accept as necessarily true accounts Mr. Jones believes to be designed to create sympathy for passage of additional gun restrictions. Likewise, each of the statements was a communication between individuals who join together to collectively express, promote, pursue, or defend common interests. Thus, each complained of statement and/or broadcast is based on, related to and in response to Defendants' exercise of their right to free speech, right of association and right to petition, each of which is equally protected under the TCPA.

[95] Tex. Civ. Prac. & Rem. Code §27.001(2); Tex. Civ. Prac. & Rem. Code §27.001(4)(B-D)

i. April 22, 2017

The complained of specific statements made by Mr. Jones during the April 22, 2017, broadcasts were undeniably statements made with regard to a matter of public concern.[96] Each individual statement, both when viewed in its context as well as when viewed by itself, refers to matters of public concern.

When viewed in the entire context of the April 22, 2017, broadcast, it is clear that Mr. Jones is expressing his personal opinions and viewpoints with regard to questioning the mainstream media and government. Further, the same is apparent simply from reviewing the statements that are isolated and taken out of context by the Plaintiffs.

For example, in paragraph 14 of Plaintiffs' Original Petition, the following statement is isolated as being defamatory because it, according to Plaintiffs, allegedly promotes an argument that the "Sandy Hook shooting was faked or staged, and that Plaintiffs Veronique De La Rosa and Leonard Pozner are 'Sandy Hook Vampires' engaged in a cover-up."[97]

> "And then we've got Anderson Cooper, famously, not just with the flowers blowing and a fake, but when he turns, his nose disappears repeatedly because the green-screen isn't set right. And they don't like to do live feeds because somebody might run up. CNN did that in the Gulf War and admitted it. They just got caught two weeks ago doing it in supposedly Syria. And all we're saying is, if these are known liars that lied about WMDs, and lied to get us in all these wars, and back the Arab Spring, and Libya, and Syria, and Egypt, and everywhere else to overthrow governments, and put in radical Islamicists… if they do that and have blood on their hands, and lied about the Iraq War, and were for the sanctions that killed half a million kids, and let the Islamicists… attack Serbia, and lied about Serbia launching the attach, when it all came out later that Serbia didn't do it, how could you believe any of it if you have a memory? If you're not Dory from 'Finding Dory,' you know, the Disney movie. Thank god you're so stupid, thank god you have no memory. It all goes back to that."[98]

[96] Plaintiffs' Original Petition isolates statements made from the April 22, 2017, broadcast. *See* Plaintiffs' Original Petition, at ¶¶13, 14, 17, 18, 19, 20 and 21.
[97] Plaintiffs' Original Petition, at ¶22
[98] Plaintiffs' Original Petition, at ¶14

The unambiguous language and meaning of this statement is undoubtedly referring to a matter of public concern (i.e., questioning the Government and mainstream media). Additionally, these statements pertained to a matter of public concern because Jones was also criticizing CNN's reporting and its television content is a good, product, or service in the marketplace.

Plaintiffs also argue that the April 22, 2017, broadcast in its entirety was defamatory.[99] However, the entire broadcast likewise was in reference to matters of public concern. Therefore, Plaintiffs' claims regarding the individual statements from the April 22, 2017, broadcast, as well as the April 22, 2017, broadcast in its entirety are based on, related to and in response to Mr. Jones "[e]xercise of the right of free speech" because each statement and broadcast was "a communication made in connection with a matter of public concern" as defined by the TCPA.[100] Thus, the TCPA is applicable to each of Plaintiffs' claims with regard to the April 22, 2017, broadcast.[101]

ii. April 28, 2017

Similarly, Plaintiffs' claim that statements made from, as well as the entire April 28, 2017, broadcast, were defamatory. Specifically, Plaintiffs' claim that the following statement made by Mr. Jones during the April 28, 2017, broadcast constitutes defamation:

> "I think we should investigate everything because ***the government*** has staged so much stuff, and then they lie and say that I said the whole thing was totally fake when I was playing Devil's advocate in a debate. I said maybe the whole thing is real, maybe the whole thing is fake. They were using blue-screens out there… Yes, ***the governments*** stage things."[102]

[99] Plaintiffs' Original Petition, at ¶62 and ¶63.
[100] Tex. Civ. Prac. & Rem. Code §27.001(3)
[101] Plaintiffs' Original Petition also includes other specific statements made by Mr. Jones during the April 22, 2017, broadcast, but it is unclear whether they contend and argue that each statement included in their petition was defamatory. However, should Plaintiffs argue that each of the specified statements constitutes defamation, each one of the statements was likewise made in connection with a matter of public concern, thus invoking the applicability and protection of the TCPA.
[102] Plaintiffs' Original Petition, at ¶23 (emphasis added)

Again, it is apparent from the text of the statement that Mr. Jones' statement was made with regard to a matter of public concern because the statement was made in connection with his opinion and view regarding the government.[103] Therefore, the TCPA is applicable to each of Plaintiffs' claims regarding the April 28, 2017, broadcast.

iii. June 18, 2017

Plaintiffs' claims regarding the June 18, 2017, so-called "broadcast" encounter many difficulties, as will be fully explained below. Nonetheless, the complained of statements made by Mr. Jones, taken out of context, edited and published by NBC and Megyn Kelly (not Defendants), were statements made in connection with a matter of public concern. One of the specific statements that Plaintiffs included in their petition is Mr. Jones' following statement:

"I do think there's some cover-up and some manipulation."[104]

Mr. Jones is again making a comment on and sharing his opinion with regard to the government, which unequivocally constitutes a matter of public concern. Thus, the TCPA likewise applies to each of Plaintiffs' claims based upon the June 18, 2017, broadcast.

Therefore, Mr. Jones has established by a preponderance of the evidence that Plaintiffs' entire lawsuit is "based on, relates to, or is in response to" Defendants' exercise of First Amendment rights. Because Defendants have established their burden and the applicability, the burden now shifts to Plaintiffs to establish by clear and specific evidence a prima facie case for each essential element of their claims.

2. Plaintiffs' legal action is otherwise "based on, relates to and is in response to" Defendants' exercise of their constitutionally protected rights.

[103] A "matter of public concern" includes an issue related to "the government." Tex. Civ. Prac. & Rem. Code §27.001(7)(C).
[104] Plaintiffs' Original Petition, at ¶25

Despite the fact that Plaintiffs' lawsuit and causes of action are "factually predicated" on Defendants' exercise of their constitutional rights, even if the factual predicate was based on conduct and/or statements that were not protected, the TCPA would nonetheless be applicable because Plaintiffs' entire lawsuit otherwise "relates to and is in response to" Defendants' continued voice and involvement in political issues in this country.

In an interview with Anderson Cooper on or about April 18, 2018, Ms. De La Rosa stated:

> "I think there comes a time when, if there's a choice that's made over a ***relentless period of years to pedal falsehoods and to profit from them***, then there has to be a day of reckoning and accountability. And they say that sunlight is a great disinfectant. Well, I say let it shine."[105]

As is clear, Ms. De La Rosa seeks vengeance against Mr. Jones, not for any alleged defamatory statement asserted in Plaintiff's Original Petition. Instead, Ms. De La Rosa filed this lawsuit "based on, related to and in response to" Mr. Jones "relentless period of years" expressing his opinions and viewpoints to which Ms. De La Rosa strongly objects, even if such opinions have no relationship to Ms. De La Rosa.

Mr. Pozner has also revealed that his true complaint and goal in this lawsuit is not to remedy any alleged defamatory statement made by Mr. Jones. Instead, Mr. Pozner's primary goal is to simply prevent Mr. Jones and others like him from expressing their viewpoints. On June 14, 2017, www.courant.com posted an article written by Mr. Pozner that reveals his true intent and purpose in connection with Mr. Jones. In that article, Mr. Pozner wrote as follows:

> "Inflammatory personalities such as Alex Jones make a living peddling conspiratorial rhetoric and anti-government propaganda that appeals to a specific audience… It's much more comfortable to believe that women and children did not die and ***that the government they love to loathe is coming for their guns***…

[105] Exhibit B-34 (video CNN Cooper interview of De La Rosa - https://www.cnn.com/videos/us/2018/04/19/sandy-hook-parent-alex-jones-lawsuit-cooper-intv-sot-ac.cnn)

> People like these by the tens of thousands are flocking to charismatic con men like Jones, with cultish reverence and conviction. With the aid of media platforms such as alternative talk radio, YouTube, Google, Facebook and Twitter, scores more are being reached and indoctrinated into the cult of delusional lunacy every day…
>
> The hoaxer ideology must be challenged, discredited and disparaged…
>
> The current climate of 'alternative facts' will give way to 'alternative history' if we allow the village idiots to grow in number and take over the town.
>
> The exposure of Jones and his lunatic fringe to the masses is inevitable. Only then will this disturbing cult of insanity be exposed and dealt with by mainstream society. The government and the police are bound by the first amendment to honor the conspiracy theorists' right to free speech. ***Society, however, is free to despise, renounce, shame and shun them; to administer social justice in response to their repugnant worldview and wicked deeds. Hoaxers need to be rejected and shamed by their families, their neighbors, their bosses, their co-works, their friends and their communities***…
>
> Alex Jones has demonstrated that he has the respect and ear of our president, as disturbing as this may be to the majority of responsible citizens…. ***The very fact that Jones has some semblance of influence over our president's thinking speaks to my position that we should challenge his warped and pernicious views out in the open public forum***… Maybe then people will see the monster that he truly is."[106]

In Mr. Pozner's view, although Mr. Jones is clearly expressing his view points with regard to issues presented in society (i.e., gun debate among others), which is clearly protected under the First Amendment, Mr. Jones' free speech, and all those like him, should be despised, renounced, and shamed by his families, neighbors, bosses, friends and communities. Because, as Mr. Pozner stated, their opinions and voices should be eliminated entirely due their "repugnant worldview…" Thus, Mr. Pozner seeks to prevent and silence Mr. Jones and his companies from exercising their free speech, right to associate with others to collectively express and defend

[106] Exhibit B-35

common interests and prevent them from publicly participating in political debates that Mr. Pozner deems unworthy of their participation as a result of their viewpoints.[107]

This lawsuit, aimed directly at Mr. Jones and his companies, is specifically intended to silence them and prevent them from expressing their opinions on matters of public concern. Further, as Mr. Pozner wrote, the fact that President Trump respect's Mr. Jones is "disturbing" and the "very fact that Jones has some semblance of influence over" President Trump's thinking supports Mr. Pozner's position that Mr. Jones, as well as millions others, should simply not be allowed to exercise their free speech, associate with others to promote a common goal, or petition the government for issues that Mr. Pozner deems unworthy.

Furthermore, as demonstrated in sections II and III A, above, both Plaintiffs have assumed high profile status and have fully engaged in the national debate over gun control. In fact, when their efforts with legislators and United States Senators did not yield a comprehensive ban on assault rifles, Plaintiffs decided to resort to the judicial system to obtain what they otherwise could not. Their suit against Remington was designed to accomplish what their legislative efforts failed to do, and it might have worked as a result of Remington's bankruptcy.

Just as they campaigned against certain firearms and ammunition, Plaintiffs have dedicated their time and energies to silencing those who ***express*** doubts about official reports and ***discuss*** theories about the events at Sandy Hook that are not consistent with facts that are reported in the mainstream media. Mr. Pozner's life's mission is to force hoaxers to stop communicating through the internet.[108] As stated above, this "fight…has become his life's

[107] Moreover, the fact that Jones' has "some semblance of influence" with the President is another reason for this suit.
[108] Exhibit B-1

work."[109] They've even obtained that commitment of volunteers who have actively tracked and taken down conspiracy theories and videos.

Together with Mr. Pozner, Ms. De La Rosa campaigned against Professor Tracy and successfully had him fired as a professor for expressing his conspiracy theories about Sandy Hook. Then Mr. Pozner sued Wolfgang Halbig, who is one of the most vocal conspiracy theorists about Sandy Hook.[110] In his Florida lawsuit[111], Mr. Pozner stated, among other things, that:

> "Mr. Halbig, contrary to what official authorities have already established, created a…website…focused on exposing the truth behind Sandy Hook."[112]

Now that they have had success silencing some conspiracy theorists by obtaining Professor Tracy's firing and the removal of conspiracy theories and videos and after suing Mr. Halbig, Plaintiffs set their sights on Mr. Jones and his audience.

Plaintiffs' actions included speeches before the Newtown City Council, Connecticut state legislature and the United States Congress. One and/or both of them have appeared on camera for nationally televised programs on CNN, CBS and other networks, all in their quest to outlaw conspiracy theories, assault rifles, high-capacity clips and to increase firearm registration requirements. Plaintiffs have sued the maker of the firearm used at Sandy Hook, in part, to cause its withdrawal of the bushmaster and other assault style weapons from the market.

Finally, Plaintiffs' counsel, Mark Bankston admitted on national television the real reasons for suing Defendants. Speaking of Jones, Mr. Bankston said:

> "…he's not going away. He's been given, just a Washington correspondent, he's given White House credentials…Claims to have the President's ear…Um, we think it's time for this to end, and *that's why we brought these suits*.[113]

[109] Exhibit B-24
[110] Exhibit B-36 (https://www.facebook.com/WolfgangWHalbig)
[111] Exhibit B-37
[112] *Id*.

> "…it's also *not just about the Sandy Hook parents*, either. You know, these parent have seen what happens to them for five years, being tormented. And now they're seeing *it happen to the Parkland parents. It's, it's time for this to end*."[114]

Plaintiffs' counsel's stark admissions confirm that this suit is really not about alleged defamation in the past year. Rather, it's about Plaintiffs' fear of Jones' influence in public debate and expressed desire to end that influence even on subjects not related to Plaintiffs or Sandy Hook at all.[115]

As the foregoing demonstrates, Plaintiffs have coordinated their efforts with others to ban certain weapons, ammunition and accessories and broaden gun owner restrictions. They have also coordinated and joined forces with others to silence Jones.

Plaintiffs filed this lawsuit on April 16, 2018. On that same day and using the same law firm, another lawsuit was filed against Jones by Neil Heslin alleging substantially similar facts and claims and seeking similar relief.[116] Like Plaintiffs, Mr. Heslin has been publicly active in the national debate over guns and, like Plaintiffs, his goal, in part, is to silence Jones and use his - and this lawsuit to shut down Jones' internet broadcast platform in order to restrict his and millions of others' ability to speak, associate and petition the government in opposition to Plaintiffs' and his goals to restrict gun ownership.

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[113] Exhibit B-41 (emphasis added)
[114] *Id*. (emphasis added)
[115] During her Today Show broadcast with Plaintiffs' attorney Mark Bankston, Ms. Kelly referred to Plaintiffs and their lawsuit. She then turned to Mr. Bankston and referring to a woman who was sent to prison for threats against the Pozners, said of Jones "…and even *that* has not stopped him" Mr. Bankston then replied "No it has not. There's no sign that he's going away…he's not going away…claims to have the President's ear. We think it's time for this to end and that's why we brought ***these suits***." These statements were after Ms. Kelly asked Mr. Heslin why he filed his suit. He answered "Well, it's accountability and responsibility…it's been going on for four and a half, five years… It's a total disrespect to myself, my son, the individuals who lost their lives that day but it extends so much further than that. It's disrespect to the community and the law enforcement, the first responders…it's just not right and he needs to - it needs to stop." See Exhibit B-41.
[116] Exhibit B-41

This continued coordination between Plaintiffs and Mr. Heslin is further evidence that their and his lawsuit are based on, related to or filed in response to Defendants' exercise of their constitutional rights.

Therefore, even if this Court deemed Plaintiffs' lawsuit and causes of action not being "factually predicated" upon Defendants' exercise of their constitutionally protected rights, the lawsuit and causes of action are nonetheless "based on, related to and in response to" Defendants' exercise of their constitutionally protected rights defined under the TCPA as in "there is some sort of connection, reference, or relationship between them."[117]

B. Plaintiffs cannot establish by clear and specific evidence a prima facie case for each essential element of their claims

Having established that the TCPA applies to this action, the burden shifts to the Plaintiffs to produce "clear and specific" evidence of the essential elements of their causes of action for Defamation and Defamation Per Se, Conspiracy, Respondeat Superior and Exemplary Damages.[118]

The Court in *In re Lipsky*[119] held that "[t]he words 'clear' and 'specific' in the context of this statute have been interpreted respectively to mean, for the former, 'unambiguous,' 'sure,' or 'free from doubt' and, for the latter, 'explicit' or 'relating to a particular named thing.'" Plaintiffs cannot show clear and specific evidence of each essential element of each of their claims.

1. Defamation

Defamation is a false and injurious impression of a Plaintiff published without legal excuse.[120] Actionable defamation requires: (a) publication of a false statement of fact to a third

[117] *Cavin*, 2017 Tex. App. LEXIS 6511, at *39
[118] Tex. Civ. Prac. & Rem. Code §27.005(c)
[119] *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015)
[120] *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 115 (Tex. 2000)

party; (b) that was defamatory concerning the Plaintiff; (c) with the requisite degree of fault, and (d) that proximately caused damages.[121] Compensatory damages in defamation cases "must compensate for 'actual injuries' and cannot merely be 'a disguised disapproval of the defendant.'"[122]

a. There is no clear and specific evidence that Defendants published a false statement of fact to a third party that was defamatory concerning the Plaintiffs

i. Defendants fall within the classification of "media Defendants"

Defendants in defamation actions are categorized as either media or non-media Defendants.[123] The term "media Defendant" includes members of the "traditional media," meaning print and broadcast media (e.g., newspapers, television stations, and radio stations)[124] and members of the electronic, or online, media.[125]

There is no dispute that the Defendants constitute "media Defendants." Even Plaintiffs' Original Petition acknowledges that the Defendants fall within the classification of "media."

> "Defendant Alex E. Jones… is the host of radio and web-based news programming, 'The Alex Jones Show,' and he owns and operates the website Infowars.com."[126]

Mr. Jones and his companies, Infowars and Free Speech, fall within both classifications of "media Defendants" as described above. Defendants' primary business is reporting the news and giving commentary and opinions. The online content involves matters of public concern.

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[121] *Bos v. Smith*, 2018 Tex. LEXIS 524, *26 (Tex. 2018)
[122] *Brady v. Klentzman*, 515 S.W.3d 878, 886 (Tex. 2017)
[123] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 333 (1974)
[124] *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170-171 (Tex. 2003) (magazine publisher was print media); *UTV v. Ardmore, Inc.*, 82 S.W.3d 609, 610-611 (Tex. App.- San Antonio 2002, no pet.) (television station was broadcast media); *Greer v. Abraham*, 489 S.W.3d 440, 442-443 (Tex. 2016) (trial court found blogger qualified as print media).
[125] *Service Empls. Int'l Un. v. Professional Janitorial Serv.*, 415 S.W.3d 387, 398 (Tex. App.- Houston [1st Dist.] 2013, pet. denied)
[126] Plaintiffs' Original Petition, at ¶4

The Alex Jones channel on Youtube has more than two million subscribers[127] and according to NBC and Megyn Kelly, Jones' Youtube channel as received 1.3 billion views.[128]

ii. Each complained of statement and/or broadcasts was made in connection with matters of public concern

A statement is a matter of public concern if: (1) the statement can be "fairly considered as relating to any matter of political, social, or other concern to the community" or (2) the statement concerns "a subject of legitimate news interest that is, a subject of general interest and of value and concern to the public."[129] Whether a statement is a matter of public or private concern is a question of law.[130]

As is clear from viewing the statements and broadcasts in the context in which they were made, the gist of each complained of statement and broadcast is simply to convey the importance of questioning the reports put out by the government and mainstream media. In any manner, each of the complained of statements and broadcasts can "fairly be considered as relating to any matter of political, social, or other concern to the community." Because each statement and/or broadcast constitutes a matter of public concern, the First Amendment provides greater protection to each statement and/or broadcast.[131]

iii. There are no false statements of fact or false impressions because each complained of statement and broadcast constitutes an opinion

[127] Exhibit B-38
[128] Exhibit B-39
[129] *Snyder v. Phelps*, 562 U.S. 443, 453 (2011); *Brady v. Klentzman*, 515 S.W.3d 878, 884 (Tex. 2017)
[130] *Conick v. Myers*, 461 U.S. 138, 148 n.7 (1983)
[131] *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-759, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985) (plurality opinion) ("[Speech] concerning public affairs is more than self-expression; it is the essence of self-government… Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection.")

Whether a statement was an actionable statement of fact is a question of law for this Court to decide.[132] A statement of fact "is not actionable unless a reasonable fact-finder could reasonably conclude that the statement implies an assertion of fact, considering the entire context of the statement."[133] Likewise, the "statement must also be objectively verifiable as fact."[134]

As the Texas Supreme Court has stated:

> "[E]ven when a statement is verifiable as false, it does not give rise to liability if the 'entire context in which it was made' discloses that it is ***merely an opinion masquerading as a fact.***"[135]

In determining whether a statement is that of an opinion or fact, "the Court should: (1) analyze the common usage of the specific language to determine whether it has a precise, well understood core of meaning that conveys facts, or whether the statement is indefinite and ambiguous; (2) assess the statement's verifiability, that is, whether it is objectively capable of being prove true or false; (3) consider the entire context of the article column, including cautionary language; and (4) evaluate the kind of writing or speech as to its presentation as commentary or 'hard' news."[136]

There is no clear and specific evidence that any specific statement from the April 22, April 28, and June 18, 2017, broadcasts constituted a statement of fact. Likewise, when considered in light of the broadcasts in their entirety, there is no clear and specific evidence that any of the broadcasts, ***as a whole***, conveyed a false impression regarding Plaintiffs. There is no clear and specific evidence that the complained of statements and broadcasts do not constitute Mr. Jones' commentary and simply providing his opinions.

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[132] *Champion Printing & Copying LLC v. Nichols*, No. 03-15-00704, 2017 Tex. App. LEXIS 7909, at *52 (Tex. App.- Austin 2017, pet. denied) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990)
[133] *Champion Printing & Copying LLC*, 2017 Tex. App. LEXIS 7909, at *52
[134] *Champion Printing & Copying LLC*, 2017 Tex. App. LEXIS 7909, at *52
[135] *Dallas Morning News, Inc. v. Tatum*, 2018 Tex. LEXIS 404, at *9-10 (citing *Bentley v. Bunton*, 94 S.W.3d 561, 581 (Tex. 2002) (emphasis added)
[136] *Yiamouyiannis v. Thompson*, 764 S.W.2d 338, 341 (Tex. App.- San Antonio 1988, writ denied)

In fact, many of the statements alleged to have been defamatory contain unambiguous language establishing that they were not statements of fact. With regard to the "blue-screen" or "green-screen" issue, there can simply be no statement of fact when Mr. Jones views a video of Anderson Cooper and provides his commentary and opinion with regard to possibilities as to why Mr. Cooper's nose disappeared on the video,[137] all the while directing the viewers' attention to the very video about which he opined. No reasonable reader or listener would interpret Mr. Jones' statements regarding the possibility of a "blue-screen" being used as a verifiably false statement of fact, and even if it is verifiable as false, the entire context in which it was made discloses that the statements are mere opinions "masquerading as a fact."[138]

Furthermore, in Mr. Jones' statement described in paragraph 23, he states "***I think*** we should investigate everything…"[139] Clearly, nothing about the statement conveys or could be considered a "statement of fact." The same is true for the June 18, 2017, statement where Mr. Jones again stated that "***I do think*** there's some cover-up and some manipulation."[140] These words clearly convey that the statement is that of Mr. Jones' opinion.

iv. None of the statements or broadcasts are capable of being defamatory

In making the initial determination of whether a publication is "capable of a defamatory meaning," this Court must "construe the publication 'as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it.'"[141] Whether

[137] *Gray v. St. Martin's Press, Inc.*, 221 F.3d 234, 248 (1st Cir. 2000) (quoting *Haynes v. Alfred A. Knopf. Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993) (A false statement is not actionable if "'it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts…'").
[138] *Dallas Morning News, Inc. v. Tatum*, 2018 Tex. LEXIS 404, *910 (Tex. 2018); *see also Partington v. Bugliosi*, 56 F.3d 1147, 1156-1157 (9th Cir. 1995) ("[W]hen an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment.").
[139] Plaintiffs' Original Petition, at ¶23 (emphasis added)
[140] Plaintiffs' Original Petition, at ¶25 (emphasis added)
[141] *D Magazine Partners, L.P.*, 529 S.W.3d at 434

a publication is "false and defamatory" depends on a "reasonable person's perception of the ***entirety of a publication*** and not merely on individual statements."[142] To qualify as defamatory, a statement should be derogatory, degrading, somewhat shocking, and contain elements of disgrace.[143] But a communication that is merely unflattering, abusive, annoying, irksome, or embarrassing, or that only hurts the Plaintiff's feelings, is not actionable.[144] Further, "it is not defamatory to accuse a person of doing that which he has a legal right to do."[145]

There is no clear and specific prima facie evidence that any of the alleged defamatory broadcasts or statements were, when considering a "reasonable person's perception of the entirety of a publication," capable of being defamatory. More specifically, even if Defendants' statements regarding the usage of a blue screen were false, they are simply incapable of being defamatory because, as the Austin Court of Appeals has held, it is "not defamatory to accuse" Ms. De La Rosa of "doing that which [she] has a legal right to do," which, in this case, is be interviewed in front of a blue screen.[146] Thus, regardless of the truth of the statement, it simply cannot possibly be construed as defamatory toward either Plaintiff.

v. Plaintiffs' reliance on "innuendo" cannot expand the plain meaning of words or introduce a new matter

On their face, none of the alleged defamatory statements could possibly be construed as defamatory, which is why Plaintiffs' apparently rely upon extrinsic evidence and claim that the non-defamatory statements and/or broadcasts are defamatory by innuendo. Essentially, no matter

[142] *D Magazine Partners, L.P.*, 529 S.W.3d at 434 (citing *Bentley v. Bunton*, 94 S.W.3d 561, 579 (Tex. 2002) (emphasis added); *MKC Energy Invs., Inc. v. Sheldon*, 182 S.W.3d 372, 378 (Tex. App.- Beaumont 2005, no pet.) ("The statements alleged to be defamatory must be viewed in their context; they may be false, abusive, unpleasant, or objectionable to the plaintiff and still not be defamatory in light of the surrounding circumstances… The entire communication- ***not mere isolated sentences or portions***- must be considered.") (emphasis added).
[143] *Means v. ABCABCO, Inc.*, 315 S.W.3d 209, 214 (Tex. App.- Austin 2010, no pet.)
[144] *Means*, 315 S.W.3d at 214
[145] *Means*, 315 S.W.3d at 214
[146] *Means*, 315 S.W.3d at 214

what the statement and/or broadcast says on its face, Plaintiffs claim that, by implication and innuendo, Defendants are actually directly accusing them of participating in a massive governmental conspiracy that revolves around the death of Plaintiff's child. Essentially, Plaintiffs ask this Court to disregard unambiguous language and transform that which is incapable of being defamatory into something that is defamatory.

"[T]he innuendo cannot enlarge or restrict the natural meaning of words, introduce new matter, or make certain that which was uncertain, except in so far as it connects the words published with the extrinsic or explanatory circumstances alleged."[147] In other words, "innuendo" may not transform unambiguous, non-defamatory statement into a defamatory statement by means of an unreasonable explanation or some subjective, personal interpretation of the statement not readily understandable as affecting the reputation of the Plaintiff in the community.[148]

Here, the innuendo that Plaintiffs advance from each of the statements and/or broadcasts cannot be drawn from the text of the statements and/or evidence used to support such claims. Plaintiffs impermissibly seek to "enlarge . . . the natural meaning of words" and "introduce new matter." Their "innuendo" does not seek to explain or identify anything in the broadcasts. Instead, the "innuendo" drawn by Plaintiffs changes the plain meaning of words and seeks to introduce a new matter into language that is manifestly unambiguous. Plaintiffs' are attempting to change Mr. Jones' statements regarding the government and CNN, along with its history of

[147] *Billington v. Hous. Fire & Cas. Ins.*, 226 S.W.2d 494, 497 (Tex. Civ. App.- Fort Worth 1950, no writ) (quoting *Moore v. Leverett*, 52 S.W.2d 252, 255 (Tex. Com. App. 1932)).

[148] *See Gartman v. Hedgpeth*, 138 Tex. 73, 77 (Tex. 1941) ("If the words employed are in no proper sense ambiguous or doubtful and in their ordinary and proper signification convey no defamatory meaning, such meaning cannot be enlarged or restricted by innuendo averments… If the language claimed to be defamatory is not reasonably susceptible of the meaning ascribed to it by innuendo, the innuendo will be unavailing."); *see generally Schauer v. Memorial Care Systems*, 856 S.W.2d 437, 448 (Tex. App.- Houston [1st Dist.] 1993, no writ); *Newton v. Dallas Morning News*, 376 S.W.2d 396, 398-400 (Tex. Civ. App.- Dallas 1964, no writ); *Montgomery Ward & Co. v. Peaster*, 178 S.W.2d 302, 305 (Tex. Civ. App.- Eastland 1944, no writ)

using "blue-screens," into statements directed at Plaintiffs and claiming that they are involved in a massive governmental conspiracy. Such transformation is not allowed by law. Thus, there is no clear and specific evidence to support any of the innuendos claimed by Plaintiffs.

Plaintiffs are attempting to bring extraneous and irrelevant "background" facts regarding Defendants (each of which clearly falls outside of the one-year statute of limitations) and use them to transform and change the plain meaning of unambiguous statements and broadcasts made by Defendants that are incapable of being defamatory. The true complaints of Plaintiffs lie outside of the statute of limitations and this Court must focus on the specific publications themselves to determine whether they are capable of being defamatory.

vi. None of the statements or broadcasts is "of and concerning" the Plaintiffs as they do not make even an "oblique reference" to either Plaintiff[149]

Plaintiffs must produce clear and specific evidence that "the disputed publications were 'of and concerning'" them.[150] As the Austin Court of Appeals stated:

> "There must be evidence showing that the attack was read as ***specifically directed at the plaintiff***… In other words, the publication 'must refer to some ascertained or ascertainable person and that person must be the plaintiff.'"[151]

There is no clear and specific evidence that others would recognize either Plaintiff as the object of the alleged defamatory statements and/or broadcasts. There is no clear and specific evidence that any of the alleged statements and/or broadcasts identifies or mentions, directly or indirectly, either Plaintiff. In fact, the only remote connection to any of the alleged defamatory statements was the fact that Ms. De La Rosa was being interviewed (though no audio was being

[149] Indeed, the law against group libel is clear. If a defamatory statement refers to a large group of persons, a defamation claim cannot be maintained by the group or by any individual in the group. According to Plaintiffs, the alleged statements would have also defamed all first responders, volunteers, law enforcement officers, medical professionals and others. Such breadth of a defamation claim is impermissible in Texas.
[150] *Cox Tex. Newspapers, L.P. v. Penick*, 219 S.W.3d 425, 434 (Tex. App.- Austin 2007, pet. denied)
[151] *Cox Tex. Newspapers, L.P.*, 219 S.W.3d at 434

played) by Anderson Cooper when Mr. Jones' expressed his opinion, regarding why Mr. Cooper's nose disappeared during the interview. Mr. Pozner's alleged direct or indirect connection to the defamatory statements and broadcasts is non-existent.

The specific statements and broadcasts that Plaintiffs complain of "cannot be 'of and concerning'" them because none of the broadcasts or statements "makes even an oblique reference to [the Plaintiffs] as an individual."[152] Therefore, Plaintiffs cannot meet their burden.

c. There is no clear and specific evidence that Mr. Jones possessed the requisite degree of fault

i. Plaintiffs are limited purpose public figures

Each of the Plaintiffs became a limited-purpose public figure relating to subject matter of the statements of Mr. Jones. Each became prominent in public discussions and debates about circumstances relating to Sandy Hook and the subsequent heated public debate over gun control initiatives and the Second Amendment to the U.S. Constitution.

Limited-purpose public figures are "public figures only for a limited range of issues surrounding a particular public controversy.[153] According to the Austin Court of Appeals:

> "[Limited-purpose public figures] are persons who 'thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved… inviting attention and comment,' who 'inject[] themselves or [are] drawn into a particular public controversy… assum[ing] special prominence in the resolution of public questions,' 'thrusting [themselves] into the vortex of [a] public issues… [or] engag[ing] the public's attention in an attempt to influence its outcome."[154]

[152] *Cox Tex. Newspapers, L.P.*, 219 S.W.3d at 436 (citing *Sullivan*, 376 U.S. at 289)
[153] *Neyland v. Thompson*, No. 03-13-00643-CV, 2015 Tex. App. LEXIS 3337, at *18 (Tex. App.- Austin 2015, no pet.)
[154] *Neyland*, 2015 Tex. App. LEXIS 3337, at *18

The issue of public figure status is a constitutional question for the Court to decide.[155] In making this determination, this Court is guided by the Texas Supreme Court's analysis of the Fifth Circuit's decision in *Trotter v. Jack Anderson Enters., Inc*.[156] To determine whether an individual is a limited-purpose public figure, the Texas Supreme Court has followed a three-part test: "(1) the controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution; (2) the plaintiff must have more than a trivial or tangential role in the controversy; and (3) the alleged defamation must be germane to the plaintiff's participation in the controversy."[157]

(A) The controversy at issue is public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution

In analyzing the first of these three criteria, it is obvious that numerous commentators, journalists, analysts, and public officials immediately became engaged in discussions about the tragedy and its aftermath including how the repercussions would affect the debate about guns in the country. Such discussions were highly charged and publicly aired far and wide. The hotly contested debates regarding mass shootings, the government, conspiracy theories and gun control are clearly public issues that have a wide-spread reach on not only the parties involved in this lawsuit, but the entire nation.

(B) Plaintiffs have more than a trivial or tangential role in the controversy

To determine whether an individual had more than a trivial or tangential role in the controversy, a Court should consider whether the Plaintiff: (1) actively sought publicity

[155] *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998)
[156] *Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431 (5th Cir. 1987)
[157] *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571-72 (Tex. 1998)

surrounding the controversy; (2) had access to the media; and (3) voluntarily engaged in activities that necessarily involved the risk of increased exposure and injury to reputation.[158]

As was detailed above, both Mr. Pozner and Ms. De La Rosa had more than a trivial or tangential role in this controversy. Both Plaintiffs actively sought publicity surrounding these controversies; had access to the media; and voluntarily engaged in activities that necessarily involved the risk of public criticism.

(C) The alleged defamation is germane to the Plaintiffs' participation in the controversy

It is clear from the nature of the current national controversy surrounding much of the subject matter of this litigation, as well as Plaintiffs' repeated and voluntary participation in that controversy stemming from the Sandy Hook shootings, that any criticism of them related to facts and events related to Sandy Hook and gun control would be germane to their participation in that controversy.

Sandy Hook has been at the epicenter of gun rights debates for more than five years. Four days after the tragedy, President Obama featured his call for greater gun control during his Rose Garden address at the Sandy Hook prayer vigil.[159] Since that time, 210 new laws have been enacted to strengthen gun safety and additional seven more states have background checks.[160]

Sandy Hook was widely considered a "watershed moment" in the national gun control debate. Retailers stopped selling "assault rifles" and investors pulled their money out of gun manufacturers. As West Virginia Senator Joe Manchin stated immediately afterwards, Sandy Hook "changed everything." ABC reported that the debate over gun control was already

[158] *Neyland*, 2015 Tex. App. LEXIS 3337, at *19 (citing *WFAA-TV, Inc.*, 978 S.W.2d at 572-573)
[159] Exhibit B-21
[160] Exhibit B-22

"fierce."[161] That fierce debate has continued unabated and Plaintiffs have been active and public participants in that debate.

Within that controversy reside the hundreds of thousands of opinions and discussions on the internet that reflect deep seated distrust of official government accounts of high profile tragedies. A google search conducted on June 22, 2018 of the term "Sandy Hook conspiracies" generated 4,160,000 articles. Searching "Sandy Hook shootings gun control" yielded more than 5,950,000 articles.[162]

There can be no doubt that Sandy Hook and subsequent investigations have been at the center of gun control debate in this country for years. It is not surprising then that these subjects have also been prominent in the debates relating to the Second Amendment in and among hundreds of thousands of internet sites and among those who question the governments' accounts of it. Contrary to their assertions, Plaintiffs have, at all relevant times to this lawsuit, been "limited-purpose public figures" in that debate.

ii. There is no clear and specific evidence of actual malice

The distinction between a private plaintiff and a limited-purpose public figure in a defamation case is important because, while the private plaintiff need only show the broadcaster of an allegedly defamatory statement "knew of should have known" that the statement was false, a limited-purpose public figure plaintiff must show that the broadcaster had "actual knowledge that it was false or the statement was made with reckless disregard of whether it was false or not.[163] In other words, because Plaintiffs are limited-purpose public figures, they must establish that the Defendants acted with ***actual malice***.[164]

[161] Exhibit B-23
[162] Exhibit B, at ¶30
[163] *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998)
[164] *Carr v. Brasher*, 776 S.W.2d 567, 571 (Tex. 1989)

The Texas Supreme Court has explained that "[a]ctual malice is not ill will; it is the making of a statement with knowledge that it is false, or with reckless disregard of whether it is true."[165] In fact, the "constitutional focus is on the defendant's attitude toward the truth, not his attitude toward the plaintiff."[166]

Further, "reckless disregard' is defined as a high degree of awareness of probable falsity, for proof of which the plaintiff must present 'sufficient evidence to permit the conclusion that the ***defendant in fact entertained serious doubts as to the truth of his publication***.'"[167]

The "actual malice" standard also differs depending on what Plaintiffs allege was defamatory. When a claim for defamation is based on individual statements, actual malice is defined as publishing a statement with knowledge of or reckless disregard for its falsity.[168]

However, if the defamation claim is based on an ***entire publication***, actual malice is defined as publishing a statement that the Defendant knew or strongly suspected could present, as a whole, a false and defamatory impression of events.[169] As the Texas Supreme Court has stated:

> "This rule stems from the actual malice standard's purpose of protecting innocent but erroneous speech on public issues, while deterring 'calculated falsehood.'" A publisher's presentation of facts may be misleading, even negligently so, but is not a 'calculated falsehood' unless the publisher knows or strongly suspects that it is misleading."[170]

Plaintiffs cannot show clear and specific evidence that actual malice was present in any of the alleged defamatory statements and/or broadcasts. Furthermore, mere questioning of

[165] *Carr*, 776 S.W.2d at 571
[166] *Greer v. Abraham*, 489 S.W.3d 440, 444 (Tex. 2016)
[167] *Carr*, 776 S.W.2d at 571 (emphasis added)
[168] *Neely*, 418 S.W.3d at 69
[169] *Turner v. KTRK TV, Inc.*, 38 S.W.3d 103, 120-121 (Tex. 2000)
[170] *Turner*, 38 S.W.3d at 120

official reports and citing inconsistencies in statements made by others is not evidence of actual malice.[171]

d. There is no clear and specific evidence that any alleged defamatory publication was the proximate cause of Plaintiffs' injuries

Finally, there is no clear and specific evidence that each of the alleged defamatory publications was the proximate cause of Plaintiffs' injuries.[172]

2. Defamation Per Se

"Defamation per se refers to statements that are so obviously harmful that general damages… may be presumed."[173] A statement is defamatory per se "if the words in and of themselves are so obviously hurtful to the person aggrieved by them that they require no proof of injury… If the court must resort to innuendo or extrinsic evidence to determine that the statement was defamatory," then the alleged statement constitutes defamation per quod and "requires proof of injury and damages.[174]

There is no clear and specific evidence that any of the alleged defamatory statements and/or broadcasts, in and of themselves, were so obviously harmful or fall within one of the categories of defamation per se. There is no clear and specific evidence that the statements and/or broadcasts: (1) injured Plaintiffs' reputation and thus, exposed them to public hatred, contempt or ridicule, or financial injury; (2) impeached Plaintiffs' honesty, integrity, virtue, or

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[171] *See, e.g.*, *Bose*, 466 U.S. at 512-13 (choice of language to describe an "event 'that bristled with ambiguities' and descriptive challenges for the [speaker] . . . does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella.").
[172] *Bos*, 2018 Tex. LEXIS 524, at *27
[173] *Brady v. Klentzman*, 515 S.W.3d 878, 886 (Tex. 2017)
[174] *Barker v. Hurst*, 2018 Tex. App. LEXIS 4555 at 23 (Tex. App. – Houston [1st Dist.] June 21, 2018, *Main v. Royall*, 348 S.W.3d 381, 390 (Tex. App.- Dallas 2011, no pet.); *see also Moore v. Waldrop*, 166 S.W.3d 380, 386 (Tex. App.- Waco 2005, no pet.); *KTRK Television, Inc. v. Robinson*, 409 S.W.3d 682, 691 (Tex. App.- Houston [1st Dist.] 2013, pet. denied) ("If the court must resort to innuendo or extrinsic evidence to determine whether a statement is defamatory, then it is defamation *per quod* and requires proof of injury and damages.")

reputation; or (3) published Plaintiffs' natural defects and thus exposed Plaintiffs to public hatred, ridicule, or financial injury.

Further, there is no clear and specific evidence that the statements and/or broadcasts: (1) falsely charged Plaintiffs with the commission of a crime; (2) injured Plaintiffs in their office, profession or occupation; (3) imputed that Plaintiffs presently have a loathsome disease; or (4) imputed sexual misconduct to either Plaintiff. Therefore, there is no clear and specific evidence to support Plaintiffs' claims for defamation per se.

3. Conspiracy

Under Texas law, an action for civil conspiracy requires five elements: (a) a combination of two or more persons; (b) the persons seek to accomplish an object or course of action; (c) the persons reach a meeting of the minds on the object or course of action; (d) one or more unlawful, overt acts are taken in pursuance of the object or course of action; and (e) damages occur as a proximate result.[175]

a. There is no clear and specific evidence of a combination of two or more persons

To prove conspiracy, the Plaintiffs must establish that the Defendant was a member of a combination of two or more persons.[176] However, Texas law is clear that a single entity cannot conspire with itself.[177] Because a corporation cannot conspire with itself, corporate agents cannot conspire with each other when they participate in corporate action.[178] Likewise, an agent cannot

[175] *Tri v. J.T.T.*, 162 S.W.3d 552, 556 (Tex. 2005)
[176] *Firestone Steel Prods. v. Barajas*, 927 S.W.2d 608, 614 (Tex. 1996)
[177] *Fisher v. Yates*, 953 S.W.2d 370, 382 (Tex. App.- Texarkana 1997, pet. denied); *see also Editorial Caballero, S.A. de C.V. v. Playboy Enters.*, 359 S.W.3d 318, 337 (Tex. App.- Corpus Christi 2012, pet. denied) ("[A] company cannot conspire with its own employees as a matter of law.")
[178] *Crouch v. Trinque*, 262 S.W.3d 417, 427 (Tex. App- Eastland 2008, no pet.); *Wilhite v. H.E. Butt Co.,* 812 S.W.2d 1, 5 (Tex. App.- Corpus Christi 1991, no writ) (holding that, as a matter of law, a corporation cannot conspire with itself, no matter how many agents of the corporation participate in the alleged conspiracy); *Bayou Terrace Inv. Corp. v. Lyles*, 881 S.W.2d 810, 815 (Tex. App.- Houston [1st Dist.] 1994, no writ) ("[A] corporation

conspire with its principal[179] because "the acts of an agent and its principal are the acts of a single entity, and cannot constitute conspiracy."[180]

There is no clear and specific evidence that any of the Defendants was a member of two or more persons. Mr. Jones is the sole member of Defendants Free Speech Systems LLC and Infowars LLC, and he cannot have conspired with himself or his own agents (i.e. employees or managers of the LLCs).[181] Thus, Plaintiffs' conspiracy claims fail as a matter of law.

b. There is no clear and specific evidence that Defendants sought to accomplish an object or course of action

Plaintiffs also must establish that the object of the combination was to accomplish: (i) an unlawful purpose; or (ii) a lawful purpose by unlawful means.[182] The Plaintiffs must show that at least one of the named Defendants was liable for an underlying tort[183] because the basis of a conspiracy claim is the damage resulting from the commission of the trot, not the conspiracy itself.[184] Further, there can be no conspiracy to accomplish a lawful purpose by lawful means, even when the Defendants acted with malice, which is not the case here.[185]

There is no clear and specific evidence that the object of any alleged combination was to accomplish an unlawful purpose or a lawful purpose by unlawful means. More specifically, because there is no clear and specific evidence to support the elements of Plaintiffs' defamation and defamation per se claims, the claim for conspiracy likewise fails.[186]

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cannot conspire with its own management personnel or employees when they act within the scope of their employment or in an agency relationship.")

[179] *Bradford v. Vento*, 48 S.W.3d 749, 761 (Tex. 2001)

[180] *Lyons v. Lindsey Morden Claims Mgmt.*, 985 S.W.2d 86, 91 (Tex. App.- El Paso 1998, no pet.)

[181] See Exhibit A, ¶3

[182] *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 881 (Tex. 2010)

[183] *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996)

[184] *Schlumberger Well Surv. Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 856 (Tex. 1968)

[185] *Brown v. American Freehold Land Mortg. Co.*, 80 S.W. 985, 987 (Tex. 1904)

[186] *MKC Energy Invs., Inc.*, 182 S.W.3d at 378 ("When non-libel claims are based on a libel cause of action, the person claiming a defamatory statement must first establish the libel elements in order to recover on the non-libel

c. There is no clear and specific evidence that Defendants reached a meeting of the minds on the object or course of action

In addition, Plaintiffs must also establish that the parties involved had a meeting of the minds about the object of their conspiracy.[187] To have a meeting of the minds, the conspirators must have knowledge of the object and purpose of the conspiracy.[188] A Defendant "without knowledge of the object and purpose of a conspiracy cannot be a conspirator; he cannot agree, either expressly or tacitly, to the commission of a wrong" of which he is not aware.[189] Likewise, "meeting of the minds" means there was an agreement or understanding between conspirators to inflict a wrong on another party.[190]

There is no clear and specific evidence that there was a "meeting of the minds" on the object or course of action between Defendants, irrespective of whether they are legally capable of conspiring with one another.

d. There is no clear and specific evidence of one or more unlawful, overt acts that were taken in pursuance of the object or course of action

Plaintiffs must also establish that one of the persons involved committed at least one unlawful, overt act in furtherance of the conspiracy.[191] There is no clear and specific evidence that one or more persons committed at least one unlawful, overt act in furtherance of the alleged conspiracy.

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claims."). In this case, Plaintiffs' non-defamation claim, conspiracy, rests entirely on their claim for defamation. Therefore, without prevailing on their claim for defamation, Plaintiffs' conspiracy claim fails as a matter of law.

[187] *Transport Ins. v. Faircloth*, 898 S.W.2d 269, 278 (Tex. 1995)

[188] *Schlumberger Well Surv. Corp.*, 435 S.W.2d at 857

[189] *Schlumberger Well Surv. Corp.*, 435 S.W.2d at 857

[190] *Chu v. Hong*, 249 S.W.3d 441, 446 (Tex. 2008) ("[Conspiracy Defendant] could only be liable for conspiracy if he agreed to the *injury* to be accomplished; agreeing to the *conduct* ultimately resulting in injury is not enough.") (emphasis in original).

[191] *Massey v. Armco Steel Co.*, 652 S.W2d 932, 934 (Tex. 1982)

e. There is no clear and specific evidence that damages occurred as a proximate result

Finally, Plaintiffs must also establish that they suffered damages as a proximate result of the wrongful act underlying the conspiracy.[192] Any recovery for a conspiracy is based on the injury caused by the underlying tort[193] because the conspiracy is not in itself a harm meriting damages.[194] There is no clear and specific evidence that damages occurred as a proximate result of any alleged conspiracy.

4. Respondeat Superior

The elements of respondeat superior are: (a) the Plaintiff was injured as the result of a tort; (b) the tortfeasor was an employee of the Defendant; and (c) the tort was committed while the employee was acting within the scope of employment.

a. There is no clear and specific evidence that the Plaintiffs were injured as a result of a tort

To hold a Defendant vicariously liable under respondeat superior, the Plaintiffs must prove that they were injured as the result of a tort.[195] There is no clear and specific evidence that the Plaintiffs were injured as a result of any tort.

b. There is no clear and specific evidence that any alleged tortfeasor was an employee of the Defendants

[192] *ERI Consulting Eng'rs, Inc.*, 318 S.W.3d at 881
[193] *Lesikar v. Rappeport*, 33 S.W.3d 282, 301-302 (Tex. App.- Texarkana 2000, pet. denied)
[194] *Deaton v. United Mobile Networks, L.P.*, 926 S.W.2d 756, 760 (Tex. App.- Texarkana 1996) (no damages for conspiracy because it is not independent cause of action), *rev'd in part on other grounds*, 939 S.W.2d 146 (Tex. 1997)
[195] *G&H Towing Co. v. Magee*, 347 S.W.3d 293, 296 (Tex. 2011)

The Plaintiffs must also establish that the alleged tortfeasor was an employee of the Defendant.[196] There is no clear and specific evidence that any alleged tortfeasor was an employee of the Defendants.

c. There is no clear and specific evidence that any alleged tort was committed while the employee was acting within the scope of employment

Finally, the Plaintiffs must establish that the employee was acting within the scope of employment when the tort was committed.[197] There is no clear and specific evidence that that any alleged employee of the Defendants were acting within the scope of their employment when the tort was committed.

5. Exemplary Damages

Pursuant to §73.055(c) of the Texas Civil Practice & Remedies Code:

> "If not later than the 90th day after receiving knowledge of the publication, the person does not request a correction, clarification, or retraction, the person may not recover exemplary damages."[198]

Plaintiffs did not contact Defendants about the Broadcasts within the ninety-day requirement. Instead, Plaintiffs waited until April 11, 2018, almost a year after the alleged defamatory statements and broadcasts were published, and just weeks before filing suit.[199] Accordingly, any claim for exemplary damages is barred.[200]

C. Defendants are entitled to dismissal because they can prove by a preponderance of the evidence each essential element of their defenses

[196] *Baptist Mem'l Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 947 (Tex. 1998)
[197] *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 757 (Tex. 2007)
[198] Tex. Civ. Prac. & Rem. Code §73.055(c)
[199] Exhibit C, Taube Aff., at ¶5 and C-2 and Exhibit B, ¶47
[200] Tex. Civ. Prac. & Rem. Code §73.055(c). Plaintiffs' Original Petition claims that they are "also entitled to exemplary damages because the Defendants acted with malice." Because of their failure to follow the statutory ninety-day requirement as described above, this claim against Defendants is barred as a matter of law.

Even if Plaintiffs were able to produce clear and specific evidence of each of their claims for defamation, defamation per se, conspiracy and respondeat superior, this Court must still nonetheless dismiss each of their claims because Defendants can establish one or more valid defenses to Plaintiffs' claims by a preponderance of the evidence.[201]

1. Statute of Limitations

The limitations period for an action for defamation is one year.[202] To the extent that Plaintiffs argue and/or claim that somehow the alleged "long history" of defamatory statements described and included in paragraphs 36-58 of Plaintiffs' petition, constitute independent claims, such claims are barred by the statute of limitations. The focus of a defamation inquiry is whether the alleged defamatory statement/broadcast (in this case, the April 22, April 28 and June 18, 2017, broadcasts) are ***in and of themselves*** defamatory.

2. Opinion

Jones' statements as described by Plaintiffs are merely his opinions. His statement to reporters at the end of his April 28 custody news conference is obvious opinion. His opinion is that he does not trust "government" because they "stage things".

> "I think we should investigate everything because ***the government*** has staged so much stuff, and then they lie and say that I said the whole thing was totally fake when I was playing Devil's advocate in a debate. I said maybe the whole thing is real, maybe the whole thing is fake. They were using blue-screens out there… Yes, ***the governments*** stage things."[203]

While others may not share his opinion that governments "stage things", and more importantly if others' opinion is that Jones is 'crazy', that is not relevant. Indeed, judging another's opinions and judging them against the "mainstream" would impermissibly stifle the

[201] Tex. Civ. Prac. & Rem. Code §27.005(d)
[202] Tex. Civ. Prac. & Rem. Code §16.002(a)
[203] Plaintiffs' Original Petition, at ¶23 (emphasis added)

free ***thoughts*** of ***everyone***.[204] His opinion does not become actionable defamation simply because others disagree with it. Indeed, if the ***reasons*** some distrust government become relevant for defamation, then anyone at any time can be liable for defamation if they state distrust of the government and their ***reasons*** are not "acceptable".

Likewise his statements on April 22 question the government and CNN (and other mainstream media "if these are known liars") are filled with his opinions (that the mainstream media and government are not trustworthy and have misled the country to do morally wrong things).

> "And then we've got Anderson Cooper, famously, not just with the flowers blowing and a fake, but when he turns, his nose disappears repeatedly because the green-screen isn't set right. And they don't like to do live feeds because somebody might run up. CNN did that in the Gulf War and admitted it. They just got caught two weeks ago doing it in supposedly Syria. And all we're saying is, if these are known liars that lied about WMDs, and lied to get us in all these wars, and back the Arab Spring, and Libya, and Syria, and Egypt, and everywhere else to overthrow governments, and put in radical Islamicists… if they do that and have blood on their hands, and lied about the Iraq War, and were for the sanctions that killed half a million kids, and let the Islamicists… attack Serbia, and lied about Serbia launching the attach, when it all came out later that Serbia didn't do it, how could you believe any of it if you have a memory? If you're not Dory from 'Finding Dory,' you know, the Disney movie. Thank god you're so stupid, thank god you have no memory. It all goes back to that."[205]

Plaintiffs – and perhaps the majority - may disagree with Jones' conclusions he has reached and opinions he has expressed based on those conclusions, but that does not lead to defamation claims for ***false*** statements. To the extent that Plaintiffs disagree with what they consider to be "facts" in this statement, considering these statements as a whole, it is clear to a reasonable reader/listener that the statements are merely opinion and personal surmise built upon those facts. Others may find these and other of Jones' statements unpleasant but even caustic,

[204] "His thoughts inhabit a different plane from those of ordinary men; the simplest interpretation of that is to call him crazy." ― Juliet Marillier, *The Dark Mirror*
[205] Plaintiffs' Original Petition, at ¶14

abusive, unflattering and offensive speech is not necessarily defamatory nor is speech that hurts the plaintiffs' feelings or is annoying, irksome or embarrassing defamatory.[206]

Furthermore, when one states a fact upon which he or she bases the opinion, or the opinion is based upon facts that are common knowledge, or the facts are readily accessible to the recipient, these fall into the category of pure opinion.[207] Even if not directed at CNN and the government, as they were, at most these statements were rhetorical hyperbole.[208]

Just as his statements on April 22 and April 28, the statements that NBC broadcast on June 18 were not defamatory and were merely opinions.

"I do think there's some cover-up and manipulation."

"…it looks like a drill."

"they don't get angry…(about dead Iraqis children and illegals)"

Neither are these statements factual nor are they defamatory. They are just Jones' opinions.

As stated above, whether a particular statement is a protected expression of opinion or an actionable statement of fact is a question of law for this Court.[209] "All assertions of opinion are protected by the first amendment of the United States Constitution and article I, section 8 of the Texas Constitution."[210] In determining whether a statement is that of an opinion, "the Court should: (1) analyze the common usage of the specific language to determine whether it has a precise, well understood core of meaning that conveys facts, or whether the statement is indefinite and ambiguous; (2) assess the statement's verifiability, that is, whether it is objectively

[206] *Barker v. Hurst*, 2018 Tex. App. LEXIS 4555 at 18 (Tex. App. – Houston [1st Dist.] June 21, 2018
[207] *Lizotte v. Welker*, 45 Conn. Supp. 217, 709 A. 2d 50, 59(Conn. Super. Ct 1996) cited by *Farias v. Garza*, 426 SW 3d 808, 819 (Tex. – App. San Antonio 2014, pet. denied)
[208] *Farias v. Garza*, 426 SW 3d 808, 819 ("secret, illegal and corrupt" and "blatant coverup attempt" were held to be rhetorical hyperbole)
[209] *Carr*, 776 S.W.2d at 570
[210] *Carr*, 776 S.W.2d at 570

capable of being prove true or false; (3) consider the entire context of the article column, including cautionary language; and (4) evaluate the kind of writing or speech as to its presentation as commentary or 'hard' news."[211]

3. Infowars is not liable

Infowars, LLC has no relationship to Plaintiffs' claims. It does not own or operate the domain name or website located at http://www.infowars.com. It has never employed Alex Jones or Owen Shroyer. It has never had authority over or control of the content of the broadcasts including any of the allegedly defamatory broadcasts.[212]

D. Conclusion

The true gravamen of Plaintiffs' claim is that it is simply too hurtful for others, including Jones, to question aspects of the events surrounding the most tragic and sorrow-filled day in their lives. Others, understandably sympathetic to Plaintiffs' tremendous loss and in admiration of their perseverance and pursuit of their goals, likewise may feel repulsed by Jones' expressions and may be supportive of Plaintiffs' claims against Defendants. Clearly, to many, his speech is offensive. Just as clearly, speech can never be silenced because it offends or is unpopular.

During arguments before the United States Supreme Court in the emotion-laden case of Albert Snyder for defamation against protesters at his marine son's funeral, Justice Ginsburg asked if the First Amendment must tolerate "exploiting this bereaved family." The protesters carried signs saying "Thank God for Dead Soldiers" and "You're Going to Hell." The case pit the right of the father to grieve privately against the protesters' right to say what they want, no matter how offensive. The ACLU's position was clear even though it abhorred the content of the speech.

[211] *Yiamouyiannis v. Thompson*, 764 S.W.2d 338, 341 (Tex. App.- San Antonio 1988, writ denied)
[212] Exhibit B, ¶45

> "The First Amendment really was designed to protect a debate at the fringes. You don't need the courts to protect speech that everybody agrees with, because that speech will be tolerated. You need a First Amendment to protect speech that people regard as intolerable or outrageous or offensive — because that is when the majority will wield its power to censor or suppress, and we have a First Amendment to prevent the government from doing that.[213]

Faced with the obvious and critical tension between the father's right to grieve in private and the First Amendment rights of the protesters to say such offensive and vile expressions, the Supreme Court held 8 to 1 for the protesters.[214] Recognizing this painful conflict between free speech and Mr. Snyder's terrible loss, the Court wrote:

> "If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable…indeed the point of all speech protection…is to shield just those choices of content that in someone's eyes are misguided, or even hurtful."[215]

> "Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and – as it did here – inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a nation, we have chosen a different course – to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[216]

Because this suit is based on, relates to or is in response to the Defendants' exercise of their First Amendment rights, the TCPA applies. Because the Plaintiff's cannot provide clear and specific evidence of each element of each of their claims, this suit must be dismissed. This is especially so because Defendants have produced a preponderance of evidence establishing each element of their affirmative defenses.

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[213] Exhibit B-40 ACLU Legal Director Steven Shapiro on NPR (https://www.aclu.org/blog/free-speech/protecting-outrageous-offensive-speech)
[214] *Snyder v. Phelps*, 562 U.S. 443 (2011)
[215] *Snyder* at 458
[216] *Id*. at 460-461

VII.

PRAYER

WHEREFORE PREMISES CONSIDERED, Defendants respectfully requests that the Motion be granted and the Court grant them such other and further relief as the Court deems equitable, just and proper.

RESPECTFULLY SUBMITTED,

GLAST, PHILLIPS & MURRAY, P.C.

/s/ Mark C. Enoch

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ATTORNEY FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June, 2018, the foregoing was sent via email and via efiletxcourts.gov's e-service system to the following:

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/s/ Mark C. Enoch
Mark C. Enoch

NO. D-1-GN-18-001842

LEONARD POZNER AND VERONIQUE DE LA ROSA,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
v.	§	TRAVIS COUNTY, TEXAS
ALEX E. JONES, INFOWARS, LLC, AND FREE SPEECH SYSTEMS, LLC,	§	
Defendants	§	345th JUDICIAL DISTRICT

AFFIDAVIT OF ALEX E. JONES

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, the undersigned notary public, on this day personally appeared Alex E. Jones, known to me to be the person whose name is subscribed below, and who on his oath, deposed and stated as follows:

1. My name is Alex E. Jones. I am over the age of 21 years, have never been convicted of a felony or crime involving moral turpitude, am of sound mind, and am fully competent to make this affidavit. I have personal knowledge of the facts herein stated and they are true and correct.

2. Regarding Plaintiffs' claims about the June 18, 2016 NBC video, I had no authority over or say in whether that would be broadcast and if so, what parts of my previous interview with Ms. Kelly would be aired. I recall that I spent more than 14 hours that day with the NBC crew and Ms. Kelly. I recall that I was interviewed by her while