

No. 03-22-00416-CV

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**In the Court of Appeals  
for the Third District  
Austin, Texas**

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3rd COURT OF APPEALS  
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JEFFREY D. KYLE  
Clerk

Robert Francis O'Rourke,

*Appellant,*

v.

Kelcy Warren,

*Appellee.*

On Appeal from the  
424th Judicial District, San Saba County

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**APPELLANT'S BRIEF**

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**ORAL ARGUMENT REQUESTED**

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## **STATEMENT REGARDING ORAL ARGUMENT**

Appellant requests oral argument. This case presents issues regarding the First Amendment rights of a gubernatorial candidate to speak freely regarding matters of utmost public importance to Texans and warrants oral argument.



## RECORD REFERENCES

“CR” refers to the Clerk’s Record in *O’Rourke v. Warren*, No. 03-22-00416-CV.

“RR” refers to the Reporter’s Record in that same case.

## STATEMENT OF THE CASE

- Nature of the Case:* Plaintiff Kelcy Warren filed a petition claiming defamation, libel, and slander against Relator O’Rourke, who is the 2022 Democratic candidate for Texas Governor.
- Course of Proceedings:* The trial court held a hearing on Defendant’s motion to transfer venue and to dismiss the case pursuant to the Texas Citizens Participation Act (“TCPA”). RR 1.
- Respondent’s Challenged Action:* The trial court denied Defendant’s motion to transfer venue and to dismiss the suit pursuant to the TCPA. CR 673, 843

## STATEMENT OF JURISDICTION

This Court has jurisdiction over this interlocutory appeal pursuant to the Texas Citizen Participation Act (“TCPA.”) TEX. CIV. PRAC. & REM. CODE §§ 27.008; 51.014(12).

## ISSUES PRESENTED

1. Whether Defendant has shown that Plaintiff’s lawsuit is in response to his exercise of his rights of free speech and to petition the government, triggering the TCPA’s provisions.
2. Whether Defendant’s statements about Governor Abbott and energy companies are not actionable because they do not relate to Plaintiff personally.

3. Whether Defendant's colloquial use of sharp language to describe the danger inherent in Plaintiff's \$1 million campaign check and its effect on public policy is core protected political speech and nondefamatory.
4. Whether Plaintiff has failed to proffer clear and specific evidence that Defendant acted with actual malice or negligence.
5. Whether Plaintiff failed to proffer clear and specific evidence of damages.

## INTRODUCTION

Plaintiff Kelcy Warren is a billionaire and among the wealthiest people in the world. He is a top executive at Energy Transfer, a gas supply company that made \$2.4 billion in excess earnings during Winter Storm Uri in February 2021 by hiking the cost of the gas it supplied to electricity providers. Those increased costs are now being passed on to Texans through skyrocketing electricity rates.

In June 2021, Governor Abbott signed SB 3, which required some energy sector entities to winterize, but contained a loophole allowing gas suppliers to avoid winterizing (and the attendant costs) so long as they did not self-identify as critical entities. Energy Transfer has not so identified.

Shortly after Governor Abbott signed SB 3, Plaintiff Warren made his largest ever political contribution to Governor Abbott—\$1 million for his reelection campaign. This political contribution and Governor Abbott’s actions (and inactions) were immediately and consistently the source of public outcry, earning the ire of newspaper opinion editorials and commentators across the state. Six months later the matter also became the topic of the 2022 gubernatorial campaign, with Democratic candidate—and Defendant here—Beto O’Rourke criticizing the Governor for failing to take action and criticizing the campaign contributions.

In response to this public debate, Plaintiff Warren sued O’Rourke for defamation in San Saba County—a county in which an LLC he owns in turn owns a ranch, where Warren vacations with his family intermittently on holidays. But Warren has no right to

abuse the judicial system to retaliate against O'Rourke—or any other Texan—for exercising First Amendment rights. The Court should order his suit dismissed and award O'Rourke attorneys' fees; this is a prototypical candidate for early dismissal under the TCPA.<sup>1</sup>

## STATEMENT OF FACTS

Plaintiff Kelcy Warren is the co-founder and a top executive of Energy Transfer, CR 108, a large gas supply company in Texas. In February 2021, cold temperatures and winter storms led to lengthy power outages, CR 114, during which Texans lost their lives due to the lack of power. Energy Transfer reported in an SEC filing that it took in \$2.4 billion additional in earnings in the first quarter of 2021 compared to the same time the previous year.<sup>2</sup> On June 8, 2021, Governor Abbott signed into law SB 3, which exempts gas supply companies that do not self-designate as “critical natural gas facilities and entities” from winterization requirements. TEX. NAT. RES. CODE § 81.073; Acts 2021, 87th Leg., R.S., Ch. 426 (S.B. 4), Sec. 4, eff. June 8, 2021. Energy Transfer has not so designated itself.<sup>3</sup>

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<sup>1</sup> If the Court declines to dismiss the case, it should grant the Petition for Mandamus filed concurrently herewith and transfer the underlying case to an appropriate venue, El Paso County, the county where Mr. O'Rourke lives.

<sup>2</sup> Energy Transfer Form 8-K, May 6, 2021, <https://ir.energytransfer.com/static-files/fa6edeff-5e72-469d-ad30-5160241adc2a>.

<sup>3</sup> Public Utility Comm'n of Tex., Critical Natural Gas Directory Search, [https://www.puc.texas.gov/industry/electric/directories/cng/search\\_cng.aspx](https://www.puc.texas.gov/industry/electric/directories/cng/search_cng.aspx).

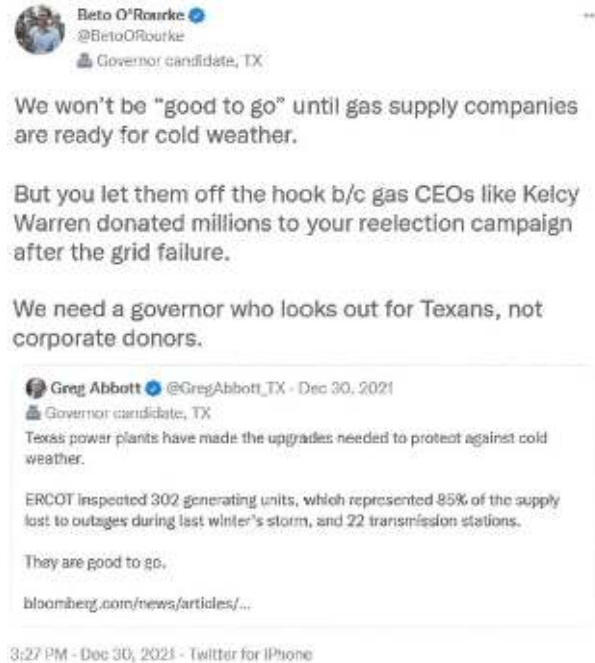
On June 23, 2021, Warren made a \$1 million contribution to Texans for Greg Abbott, his largest ever contribution. CR 89, 154. This check was one thousand times the size of the average contribution Abbott received during the reporting period. CR 221. On August 1, 2021, the Houston Chronicle Editorial Board ran a piece entitled “Editorial: We froze and Abbott got paid — \$1 million from the billionaire profiteer of Texas’ deadly storm.”<sup>4</sup>

Defendant O’Rourke, who is the Democratic nominee for the 2022 Texas Governor election, released a series of tweets and videos discussing Governor Abbott’s failure to ensure a stable and secure power grid and noting the sizeable campaign contributions he had received from oil and gas executives, like Plaintiff. CR 156-60.

Below is an example of tweets Warren alleges personally defamed him.

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<sup>4</sup> Houston Chron. (Aug. 1, 2021), <https://www.houstonchronicle.com/opinion/editorials/article/Editorial-We-froze-and-Abbott-got-paid-1-16354431.php>.



CR 260.

Plaintiff Warren filed suit on February 22, 2022, alleging that O’Rourke’s statements were defamation, slander, and libel. CR 6. He filed in the District Court of San Saba County, where he owns an LLC that owns a ranch where he spends a cumulative 2-3 months a year over a five-and-a-half-month period each year, in particular “during the Thanksgiving, Christmas, New Years and Easter holidays.” CR 112.

The district court held a hearing on Defendant’s motion to transfer venue and to dismiss pursuant to the TCPA and denied both motions. CR 673, 843.

### **SUMMARY OF ARGUMENT**

The district court abused its discretion in failing to dismiss Plaintiff’s lawsuit—a classic example of a retaliatory suit aimed to silence political debate—under the TCPA.

This Court should correct that error, order the suit dismissed, and award O'Rourke his attorney's fees.

O'Rourke has satisfied his initial burden to show that Plaintiff's suit is in response to his exercise of his speech and petition rights. O'Rourke's statements that are the subject of Plaintiff's lawsuit all concern a matter of immense public importance in Texas—the exorbitant fees charged by gas suppliers during Winter Storm Uri, Governor Abbott's approval of a loophole to excuse gas suppliers from having to winterize their infrastructure to prevent the disaster from recurring, and the influence that gas executives like Plaintiff Warren—who made a \$1 million campaign contribution—have over Abbott. Indeed, O'Rourke did not begin this conversation; newspaper across the state immediately criticized the link between Warren's contribution and Abbott's failure to protect Texans. The TCPA plainly applies.

Warren has failed to satisfy his burden to provide clear and specific evidence establishing a prima facie defamation case. First, many of the tweets and videos he complains of do not even refer to Warren, but rather to Abbott or gas companies. Second, courts have uniformly held that the colloquial use of words like “extortion,” “bribe,” and “corrupt” in the context of political campaigns and referring to the influence large donors have over politicians is protected speech and not defamatory. Warren's effort to splice O'Rourke's phrases and omit context cannot overcome the force of this precedent. Third, even if Warren had proffered any false or defamatory statements, he is a limited-purpose public figure with respect to the controversy at issue

and is required to show that O'Rourke acted with actual malice. But he has offered no evidence that O'Rourke thought that any of his statements were false or suspected them to be false and made them anyway. And even if negligence were the standard, he likewise offers no evidence of even that. Finally, he has not shown any damages.

This is a frivolous abuse of the judicial system to silence political debate. The Court should order the case dismissed and award O'Rourke his attorneys' fees.

### **STANDARD OF REVIEW**

The Court's review of a district court's motion to dismiss under the TCPA is de novo. *Grant v. Pivot Tech. Solutions, Ltd.*, 556 S.W.3d 865, 873 (Tex. App.—Austin 2018, pet. pending). “That is, [the Court] review[s] de novo whether each party has met its respective burden under the Act’s two-step dismissal mechanism.” *Id.* “[T]o avoid the threat to free speech that unrestrained defamation liability poses, the U.S. Constitution ‘imposes a special responsibility on judges whenever it is claimed that a particular communication is [defamatory].’” *Dallas Morning News v. Tatum*, 554 S.W.3d 614, 624 (Tex. 2018) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984)). Thus, “[f]or appellate judges,” there is a “‘requirement of independent appellate review’ as a matter of ‘federal constitutional law.’” *Id.* (quoting *Bose*, 466 U.S. at 510); *see also Doubleday & Co. v. Rogers*, 674 S.W.2d 751, 755 (Tex. 1984) (“[T]he first amendment requires the appellate court to independently review the evidence.”).



## ARGUMENT

### I. O'Rourke's political speech regarding corporate influence over Texas energy policy is covered by the TCPA.

The TCPA applies to O'Rourke's political speech regarding the influence billionaire gas executive and gas companies have over Governor Abbott's policy decisions. The "TCPA protects citizens from retaliatory lawsuits that seek to intimidate or silence them on matters of public concern." *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015). Under the TCPA, a defendant can obtain early dismissal of these retaliatory lawsuits. First, the Defendant bears the burden "to show 'by a preponderance of the evidence' that the plaintiff's claims 'is based on, relates to, or is in response to the [movant's] exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association.'" *Id.* (quoting TEX. CIV. PRAC. & REM. CODE § 27.005(b)). If one of these rights is implicated, "the second step shifts the burden to the plaintiff to 'establish[ ] by clear and specific evidence a prima facie case for each essential element of the claim in question.'" *Id.* at 587 (quoting TEX. CIV. PRAC. & REM. CODE § 27.005(c)).

Statements are made in the "exercise of the right of free speech," TEX. CIV. PRAC. & REM. CODE § 27.005(b), when they are "a communication made in connection with a matter of public concern." *Id.* § 27.001(3). A "matter of public concern" is a statement or activity about "a public official, public figure, or other person who has drawn substantial public attention due to the person's official acts, fame, notoriety, or

celebrity,” “a matter of political, social, or other interest to the community,” or “a subject of concern to the public.” *Id.*

O’Rourke’s political speech regarding the exorbitant prices gas suppliers like Energy Transfer charged during Winter Storm Uri, the Texas statute that prohibits such price gouging during emergencies, Governor Abbott’s failure to enforce that statute, the loophole placed in SB 3 to excuse gas suppliers from being required to winterize to prevent another catastrophe, and Warren’s \$1 million political contribution to Governor Abbott fall squarely within the definition of “matter[s] of public concern.” *Id.*<sup>5</sup>

First, many of the tweets and videos Warren proffers are, on their face, solely about Governor Abbott, his policies, and how his millions in campaign contributions from the gas industry executives influenced his decision to support exempting gas suppliers from legislation aimed at winterizing Texas’s electricity infrastructure. Every statement about Abbott’s conduct of his job as Governor is about “a public official.” *Id.*

Second, the identity of campaign contributors and the amount of their contributions “shed[s] the light of publicity on spending” on campaign funding.

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<sup>5</sup> O’Rourke’s political speech likewise falls within the “right to petition,” which includes, *inter alia*, “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.” TEX. CIV. PRAC. & REM. CODE § 27.001(4)(D).

*Osterberg v. Peca*, 12 S.W.3d 31, 42 (Tex. 2000) (quoting *Buckley v. Valeo*, 424 U.S. 1, 81 (1976)). Disclosure laws have uniformly been upheld as constitutional because they “advance[ ] a strong ‘informational interest’ [that] ‘helps voters to define more of the candidates’ constituencies.’” *Id.* (quoting *Buckley*, 424 U.S. at 81); *see also Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) (explaining that an “informed public opinion is the most potent of restraints upon misgovernment”); *McCutcheon v. FEC*, 572 U.S. 185, 223 (2014) (explaining that disclosure requirements “expos[e] large contributions and expenditures to the light of publicity”). As the U.S. Supreme Court has explained, “the ‘sources of a candidate’s financial support [ ] alert[s] the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.’” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 354 (1995) (quoting *Buckley*, 424 U.S. at 67). The U.S. Supreme Court and the Texas Supreme Court have thus repeatedly recognized that speech about who has contributed money to political candidates, how much they have contributed, and the actions the politicians receiving those contributions have taken in response are matters of public concern. Indeed, our laws require disclosure of this information precisely for the purpose of “exposing large contributions . . . to the light of publicity.” *McCutcheon*, 572 U.S. at 223. O’Rourke’s political speech about Warren’s \$1 million contribution to Abbott and its effect on Abbott’s policy positions is quintessential speech on a matter of public concern.

Moreover, O'Rourke did not begin this public conversation. Rather, it became a prominent topic of public concern immediately following the disclosure of Warren's \$1 million contribution. *See, e.g.,* Justin Miller, *Abbott Received Massive Contribution from Texas Blackouts Biggest Profiteer*, Texas Observer (July 30, 2021), <https://www.texasobserver.org/after-kelcy-warrens-energy-transfer-partners-made-billions-from-the-deadly-texas-blackouts-he-gave-1-million-to-greg-abbott/> (noting that gas industry sold fuel at "unprecedented prices" and Energy Transfer "raked in \$2.4 billion during the blackouts" with the "immense bounty soon trickl[ing] down to Governor Greg Abbott" after "Warren cut a check to Abbott's campaign for \$1 million"). On August 1, 2021, the Houston Chronicle Editorial Board ran a piece entitled "Editorial: We froze and Abbott got paid — \$1 million from the billionaire profiteer of Texas' deadly storm."<sup>6</sup> The Editorial Board noted that "Warren, a small-town East Texas native who plays guitar and writes songs in the spirit of Jackson Browne, knows how the game is played. So does Abbott, of course. It's only fair to ask what the billionaire investor got in return for his million smackolas." *Id.* That O'Rourke joined an ongoing public debate illustrates that his statements are about a matter of public concern.

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<sup>6</sup> Houston Chron. (Aug. 1, 2021), <https://www.houstonchronicle.com/opinion/editorials/article/Editorial-We-froze-and-Abbott-got-paid-1-16354431.php>.

The tweets and videos that form the basis of Warren’s suit on their face involve a matter of immense public concern. O’Rourke has thus met his initial burden under the TCPA to show that Warren’s suit is based upon statements O’Rourke made exercising his speech and petition rights. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(b).

**II. Plaintiff has not established a prima facia case of defamation by clear and specific evidence.**

Plaintiff has not established a prima facia case of defamation by clear and specific evidence. To carry his burden under the TCPA, Plaintiff “must provide enough detail to show the factual basis for its claim.” *In re Lipsky*, 460 S.W.3d at 591. This includes “pleadings and evidence that establishes the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged the plaintiff.” *Id.*

A claim for defamation has four elements: “(1) the publication of a false statement of fact to a third party, (2) that was defamatory concerning the plaintiff, (3) with the requisite degree of fault, and (4) damages, in some cases.” *Id.* at 593. In a defamation claim, “the initial threshold question for determination is a question of law . . . were the words used reasonably capable of a defamatory meaning.” *Musser v. Smith Protective Servs., Inc.*, 723 S.W.2d 653, 654 (Tex. 1987). “In answering this question, the inquiry is objective, not subjective.” *Dallas Morning News v. Tatum*, 554 S.W.3d 614, 624 (Tex. 2018) (quoting *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 157 (Tex. 2004)). A statement must “be derogatory, degrading, somewhat shocking, and contain elements of disgrace” in order “[t]o qualify as defamatory.” *Hoskins v. Fuchs*, 517 S.W.3d 834, 840

(Tex. App.—Ft. Worth 2018, pet. denied). “[T]o be actionable, a statement must assert an objectively verifiable fact rather than an opinion.” *Id.*

There are two types of defamation. Defamation *per se* “involve[s] statements that are so obviously hurtful to a plaintiff’s reputation that the jury may presume damages. . . . A statement that injures a person in her office, profession, or occupation is typically classified as defamatory *per se*.” *Hancock v. Variyam*, 400 S.W.3d 59, 63-64 (Tex. 2017). But merely accusing someone of dishonesty or negative trait is not defamation *per se*; “the proper inquiry is whether a defamatory statement accuses a professional of lacking a peculiar or unique skill that is necessary for the proper conduct of the profession.” *Id.* at 67 (concluding that calling physician untruthful was not defamatory *per se*). Defamation *per quod* is not *per se* defamatory, and requires proof of actual damages.

Plaintiff has failed to meet his burden to proffer clear and specific evidence showing a prima facie case of defamation for several reasons. First, many of the tweets and videos he cites involve O’Rourke’s statements about *Governor Abbott* and his actions or inactions related to energy policy and enforcement; they say either nothing at all about Warren or merely report that which Warren himself alleges—that he made a \$1 million campaign contribution. As a matter of law, none of these are defamatory to Warren. Second, O’Rourke’s statements about Warren—including the purported accusations of “crimes” that Warren claims in his Amended Petition—are opinions regarding a matter of public and political debate, including the colloquial and nondefamatory use of the word “bribery.” As a matter of law, courts have held that this

type of political debate about campaign contributions and their influence over politicians is not actionable. Third, Warren is a limited-purpose public figure, but has not shown any clear or specific evidence that O'Rourke acted with actual malice. Nor has he even shown negligence. Fourth, Warren has not shown he has suffered any damages. His suit, a retaliatory abuse of the judicial system that seeks to silence a political candidate he disfavors, should be dismissed.

**A. Many of the statements proffered by Plaintiff are either wholly about Governor Abbott or truthfully report Warren's \$1 million contribution.**

Many of the statements proffered by Plaintiff—in the form of O'Rourke's campaign tweets and videos—are either wholly about Governor Abbott, not Warren, or merely truthfully report the fact of Warren's \$1 million contribution. Because these are neither “defamatory *concerning the plaintiff*” nor “a false statement of fact,” *In re Lipsky*, 460 S.W.3d at 593 (emphasis added), they are not actionable. *See also Dolcefino & KTRK Telev., Inc. v. Turner*, 987 S.W.2d 100, 109 n.9 (Tex. App.—Houston [14th Dist.] 1998) (holding that statements that “do not relate to [plaintiff] at all” “cannot be defamatory” (internal quotation marks omitted)), *aff'd*, 38 S.W.3d 103 (Tex. 2000).

Warren alleges that Plaintiff began a “defamatory campaign” against him with the following December 30, 2021 tweet:



**Beto O'Rourke** ✓  
@BetoORourke  
Governor candidate, TX



We won't be "good to go" until gas supply companies are ready for cold weather.

But you let them off the hook b/c gas CEOs like Kelcy Warren donated millions to your reelection campaign after the grid failure.

We need a governor who looks out for Texans, not corporate donors.



**Greg Abbott** ✓ @GregAbbott\_TX · Dec 30, 2021  
Governor candidate, TX

Texas power plants have made the upgrades needed to protect against cold weather.

ERCOT inspected 302 generating units, which represented 85% of the supply lost to outages during last winter's storm, and 22 transmission stations.

They are good to go.

[bloomberg.com/news/articles/...](https://www.bloomberg.com/news/articles/...)

3:27 PM · Dec 30, 2021 · Twitter for iPhone

CR 115-16; 260. But this tweet is about *Governor Abbott*; the only statement it makes about Warren is that he is among “gas CEOs” who collectively “donated millions to [Abbott’s] reelection campaign”—a fact Plaintiff himself alleges in his Amended Petition. CR 113-14. Warren can neither sue over (1) O’Rourke’s statements about



Abbott and *Abbott's* response to Warren's campaign contribution nor (2) O'Rourke's truthful reporting of that contribution.<sup>7</sup>

Warren's second example of alleged defamation against him is the following two tweet sent by O'Rourke on January 4, 2022:



CR 116, 262, 264. These tweets do not mention Warren at all; the second states that *Abbott* hasn't required action by gas CEOs "perhaps" because of their millions in campaign contributions. This tweet about why *Abbott* has not acted cannot possibly be defamation against Warren.

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<sup>7</sup> While Warren quibbles in his Amended Petition that he was the Executive Chairman of Energy Transfer at the time of his contribution and no longer the CEO, CR 149-50, 166, that mistaken detail cannot, as a matter of law, be "defamatory concerning the plaintiff," *In re Lipsky*, 460 S.W.3d at 593, nor does Plaintiff allege that it was itself actionable, CR 166. He could not plausibly so allege; he *was* the CEO of Energy Transfer until recently and remains its Executive Chairman. Presumably he does not contend that being mistakenly labeled as the CEO of the company he co-founded is "derogatory, degrading, somewhat shocking, and contain[ing] elements of disgrace." *Hoskins*, 517 S.W.3d at 840. Moreover, Plaintiff himself listed his occupation as "CEO/Chairman" of Energy Transfer for his \$100,000 contribution to George P. Bush's campaign on February 14, 2022. CR 88.

Warren also contends that O'Rourke defamed him in a February 1, 2022 MSNBC interview on *All In with Chris Hayes*, in which O'Rourke said that Abbott

has done nothing to fix the major culprit in the power outage last year, which was the lack of winterization in the gas supply. That might have something to do with the fact that those in that industry have given him millions of dollars since the February freeze, including Kelcy Warren, whose company made \$2.4 billion in February off the suffering off our fellow Texans, and wrote Greg Abbott a \$1 million campaign contribution check. That explains the otherwise inexplicable as to why we haven't fixed the grid as we head into another winter.

CR 118 ¶ 26 & n.10; 270 (11:58). Here again, O'Rourke criticizes *Abbott's* failures and contends that the contribution from Warren—which he truthfully reports as \$1 million—“might have something to do with” why *Abbott* failed to fix the grid. This says nothing about Warren at all other than truthfully reporting his campaign contribution and thus cannot be defamation.

Warren also alleges that this February 7, 2022 tweet was defamatory against him:



CR 119, 284. Neither the tweet nor the video mention Warren, nor is the statement “[f]or Abbott’s top donors, the grid failure meant getting rich” plausibly defamatory as a matter of law. And Warren notably does not contend the statement is false.

O’Rourke’s statements about Governor Abbott’s failures, and the reasons Governor Abbott has failed to protect Texans from another grid failure, are not defamatory to Warren.

**B. The colloquial use of sharp words to describe the danger of \$1 million political contributions is not defamatory.**

O’Rourke’s colloquial use of sharp words to describe a gas industry billionaire making a \$1 million contribution days after the governor signed legislation containing

a loophole favoring the gas industry is protected political speech and is not defamatory. Although “[a]ccusing someone of a crime” is defamation *per se*, courts distinguish actual accusations of a technical crime from the colloquial use of words like “bribe,” “corrupt,” and “extortion.”

As the Tenth Circuit has explained,

[A]ccusations of extortion are a familiar rhetorical device. We all know of colloquial or hyperbolic uses of the term. Although the term has a derogatory meaning when used either way, we cannot assume that the term always refers to a crime or similarly heinous conduct. Like with other terms, context matters.

*Hogan v. Winder*, 762 F.3d 1096, 1108 (10th Cir. 2004); *see also Bernstein v. O’Reilly*, No. 17 CV. 9483 (DAB), 2019 WL 10995110, at \*5 (S.D.N.Y. Sept. 26, 2019) (explaining that “using colloquial phrases and loose statements,” including “extortionate” “do not convey with specificity that Plaintiff committed the crime of extortion”).

The Texas Supreme Court has likewise recognized that words like “corrupt” “may be merely epithetic.” *Bentley v. Bunton*, 94 S.W.3d 561, 581 (Tex. 2002). In doing so, the Court cited numerous cases in which the colloquial use of words that can also identify crimes were found not defamatory. *See id.* at 581 n.50 (citing *600 West 115th St. Corp. v. Von Gutfield*, 603 N.E.2d 930, 937 (2000) (statement that plaintiff and his building permit application were “as fraudulent as you can get and it smells of bribery and corruption” not defamatory); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 366 N.E.2d 1299, 1306-08 (1977) (statement that judge was “probably corrupt” a nondefamatory opinion); *Silvester v. Am. Broad. Cos.*, 650 F. Supp. 766, 772 (S.D. Fla. 1986) (stating that

business was part of “totally corrupt industry” was a general opinion and not defamatory); *Greenbelt Coop. Pub. Ass’n, Inc. v. Bresler*, 398 U.S. 6, 14 (1970) (criticizing “negotiating efforts” as “‘blackmail’ could not have been reasonably understood by any reader to refer to the commission of a crime”).

Such statements are least likely to be defamatory in the context of political campaigns and public debate. “[A]ccusations of ‘extortion,’ ‘blackmail,’ and related crimes . . . are often construed as merely rhetorical hyperbole.” *McDougal v. Fox News Network, LLC*, 489 F. Supp. 3d 174, 182 (S.D.N.Y. 2020). “Such accusations of crimes [ ] are unlikely to be defamatory when . . . they are made in connection with debates on a matter of public or political importance.” *Id.* This rule is widely accepted: “A series of decisions from courts around the country hold that similar accusations of extortion or blackmail, especially related to political issues, are almost always construed as nonactionable.” *Id.* at 183; *see also, e.g., Horsley v. Rivera*, 292 F.3d 695, 702 (11th Cir. 2002) (accusation that person was “accomplice to murder” not actionable where it occurred in context of “emotionally-charged issues of significant public concern,” such as abortion); *Remick v. Manfredy*, 238 F.3d 248, 262 (3d Cir. 2001) (calling settlement negotiations extortion not actionable); *Brodkorb v. Minnesota*, No. 12-cv-1958 (SRN) (AJB), 2013 WL 588231, at \*11-12 (D. Minn. Feb. 13, 2013) (accusation of extortion in settlement with legislators accused of discrimination not actionable); *Automated*

*Transactions, LLC v. Am. Bankers Ass'n*, 216 A.3d 71, 87 (2019) (accusation of “extortionate demands” related to licensing fees negotiation not actionable).<sup>8</sup>

In keeping with this rule, courts reject defamation claims related to accusations that people are seeking to gain influence over political officials. “Accusations of the use of political influence to gain some benefit from government are not defamatory and do not constitute libel per se.” *Farias v. Garza*, 426 S.W.3d 808, 818 (Tex. App.—San Antonio 2014, pet. denied), *disapproved on other grounds*, *In re Lipsky*, 460 S.W.3d at 587, 591; *see also Lizotte v. Welker*, 45 Conn. Supp. 217, 709 A.2d 50, 59 (1996) (concluding that statements “contributions to slush funds,” “part of the fix,” “secret, illegal and corrupt deals,” “payoffs,” “blatant coverup attempt,” and “maneuvers with political and corrupt implications” related to developer’s political contributions influencing policy decisions were “rhetorical hyperbole” and not defamatory), *aff’d*, 244 Conn. 156, 709 A.2d 1 (1998). Moreover, “it is not defamatory to accuse a person of doing that which he has a legal right to do,” *Means v. ABCABCO, Inc.*, 315 S.W.3d 209, 214 (Tex. App.—Austin 2010, no pet.), such as making campaign contributions.

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<sup>8</sup> Political commentators often describe large campaign contributions as legalized bribery. *See e.g.*, Cecil Hefted, END LEGALIZED BRIBERY: AN EX-CONGRESSMAN’S PROPOSAL TO CLEAN UP CONGRESS (1998); Fred Wertheimer, *Legalized Bribery*, POLITICO, Jan 19, 2014; Lawrence Lessig, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS-AND A PLAN TO STOP IT (2011) (quoting Jack Abramoff: “I was participating in a system of legalized bribery. All of it is bribery, every bit of it.”); Ray Henry, Jimmy Carter, *Unchecked Political Contributions Are “Legal Bribery,”* HUFFINGTON POST (July 17, 2013, 1:21 PM), [http://www.huffingtonpost.com/2013/07/17/jimmy-carter-bribery\\_n\\_3611882.html](http://www.huffingtonpost.com/2013/07/17/jimmy-carter-bribery_n_3611882.html); and Bruno J. Navarro, *Jesse Ventura Likens Politics to Bribery*, CNBC (June 19, 2012, 10:23 PM), <http://www.cnbc.com/id/47883494>.

O'Rourke's political speech about Warren's \$1 million contribution given days after Governor Abbott signed legislation containing a loophole to benefit the gas supply industry is not defamatory. Warren identifies a number of O'Rourke's tweets and videos that no reasonable person could characterize as defamatory. For example, Warren challenges the following tweets that speak generally about the gas industry having "robbed" Texans and having "bought" or "paid off" Abbott:



CR 116, 266.

CR 119 ¶ 29 & n.16

Warren also contends that the tweet below, and the accompanying video that refers generally to the gas supply industry as "highway robbers" who paid Abbott not to fix the grid, is defamatory to him:



CR 296. These statements cannot be defamatory to Warren; they do not mention him and, in any event, the use of sharp words to “[a]ccus[e] [special interests] of the use of political influence to gain some benefit from government [is] not defamatory.” *Farias*, 426 S.W.3d at 818; *Lizotte*, 709 A.2d at 59 (accusing politician of receiving “payoff” through political contributions to advance “secret, corrupt deal is not defamatory). Instead, these statements are core, protected political speech that “expos[e] large contributions . . . to the light of publicity,” *McCutcheon*, 572 U.S. at 223, so Texans will know “the interests to which [Abbott] is most likely to be responsive.” *McIntyre*, 514 U.S. at 354.

Warren’s central allegation is that O’Rourke has accused him of “committ[ing] the felonies of extortion, bribery, and corrupt influence,” CR 115, which he contends is defamation *per se*. But “accusations of ‘extortion,’ ‘blackmail,’ and related crimes . . . .



especially related to political issues, are almost always construed as nonactionable.” *McDougal*, 489 F. Supp. at 182–183. Moreover, Warren plucks the words out of their surrounding context, which makes clear that they are being used in their colloquial sense, and reflect O’Rourke’s opinion. For example, Warren alleges that the following tweet and video are defamatory to him:



CR 128. The tweet accuses *Abbott* of corruption, and in the video O’Rourke—speaking about the large campaign contributions from gas executives—says “*I don’t know what the legal term for that is, but it looks a lot like a bribe to me.*” *Id.* (emphasis added). O’Rourke thus disclaims any legal or criminal meaning, and instead offers his opinion that the episode “looks a lot like” a bribe “to me.” *Id.* This is not defamatory. *See, e.g., Von*

*Gutfeld*, 603 N.E.2d at 937 (statement that person’s treatment by government officials “smells of bribery” not defamatory). The same is true for the other statements Warren proffers in which O’Rourke uses the word “bribe.” *See* CR 289 (stating that that “Abbott taking campaign money from electricity providers and failing to fix the grid is ‘pretty close to a bribe’” (emphasis added));<sup>9</sup> CR 274 at 12:20 (stating that campaign contribution “sounds like a bribe to me” (emphasis added)). Not only did O’Rourke use the word “bribe” in its nondefamatory colloquial sense about political contributions in the context of a political campaign, *see e.g.*, *McDougal*, 489 F. Supp. at 182-83; *Von Gutfeld*, 603 N.E.2d at 937; *Lizotte*, 709 A.2d at 59, but he plainly expressed his *opinion*—saying what the conduct “looked like” to “to [him],” *see Farias*, 426 S.W.3d at 818 (concluding that accusations that Commissioners Court was “in [the] pocket” of a contributor who had “taken advantage of corrupt officials” were “merely opinion and

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<sup>9</sup> This particular tweet—from a third party saying what he heard O’Rourke say—is inadmissible hearsay that cannot support his burden under the TCPA. *See* TEX. CIV. PRAC. & REM. CODE § 27.006(a) (requiring “evidence a court could consider under Rule 166a, Texas Rules of Civil Procedure.” In 2019, the legislature amended the TCPA such that the “pleadings” are no longer considered “evidence” sufficient to sustain a claim against a TCPA motion to dismiss. *See* Act 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 5, eff. Sept. 1, 2019; *see also Buzbee v. Clear Channel Outdoors, LLC*, 616 S.W.3d 14, 27 n.9 (Tex. App.—Houston 2020, no pet.) (noting that pleadings may no longer suffice as “evidence” for TCPA purposes given 2019 amendments). Warren’s proffer of a short news brief from WOAI News Radio 1200 is likewise inadmissible hearsay. CR 287.

personal surmise built upon [ ] facts”).<sup>10</sup> As a matter of law, O’Rourke’s use of the word “bribe” in this manner is not defamation.

Warren also alleges that O’Rourke accused him of committing felony extortion and corrupt influence. CR 115. But the tweets he proffers show otherwise:



<sup>10</sup> Warren contends that O’Rourke’s use of “bribe” cannot be opinion because at a subsequent press conference O’Rourke gave a presentation about what had caused the February 2021 outage, the amount of money gas companies earned, the loophole written into SB 3, and the amount of the campaign contributions. CR 218. After doing so, O’Rourke said “[e]verything I’ve shared with you is factual . . . All I have done today and all I have done over the course of the campaign is to share *these facts* with the electorate.” CR 307 (emphasis added). But Warren does not contend he was defamed at the press conference or that anything O’Rourke said during it was false.

CR. 268. The tweet does not even use the word “extortion” in relation to *Warren*, but rather to the wildly inflated gas prices Energy Transfer charged during Winter Storm Uri, which resulted in \$2.4 billion in excess earnings over a five-day period. Nor is the colloquial use of the word “extortion” to describe prices charged during a public health emergency actionable. *McDougal*, 489 F. Supp. at 182. Likewise, the tweet calls *Abbott* corrupt for failing to fix the grid following receipt of the \$1 million campaign contribution. Warren cannot sue over O’Rourke’s commentary about Abbott, and criticizing the control special interests wield over government officials is not defamation as a matter of law. *See Farias*, 426 S.W.3d at 818; *Lizotte*, 709 A.2d at 59.

Next, Warren alleges that O’Rourke defamed him by saying he “broke the law” and “illegally” made money off freezing Texans. CR 109, 118, 119, 121. While Warren deceptively stitches together quotes out of context in his Amended Petition, the actual videos reveal that O’Rourke did not use these phrases or words in relation to Warren in his personal capacity or about his campaign contribution to Abbott. Rather, O’Rourke notes that a Texas statute makes it illegal to price gouge during a declared emergency. The law, Texas Business & Commerce Code § 17.46(b)(27) is a *civil* statute that makes “taking advantage of a disaster declared by the governor . . . by [ ] selling or leasing fuel . . . at an exorbitant or excessive price.” O’Rourke’s statements that energy companies violated this civil statute, CR 274 at 12:20, 279, 307, are not defamatory as a

matter of law.<sup>11</sup> And they certainly are not defamatory to *Warren*—he has no standing to sue about O’Rourke’s statements about Energy Transfer. *See Dolcefino*, 987 S.W.2d at 109 n.9.

Finally, Warren alleges that he was defamed when O’Rourke called Abbott an authoritarian thug and characterized Warren as his oligarch. CR 123. As with all the above statements, O’Rourke’s characterization of one of the wealthiest men in the country who has funded a governor’s campaign with more than a million dollars over the years as an “oligarch” is core protected political speech, not defamation. *Farias*, 426 S.W.3d at 818; *Lizotte*, 709 A.2d at 59; *see also Associated Press v. Cook*, 17 S.W.3d 447, 454 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (ruling that statements that are “little more than name calling” are not defamatory).

O’Rourke’s political speech is protected by the First Amendment and is nondefamatory as a matter of law.

**C. Warren has not met his burden to show O’Rourke acted with the requisite degree of fault.**

Even if Warren had established that O’Rourke made defamatory statements (he has not), he has not met his burden to show that O’Rourke acted with the requisite degree of fault. First, Warren is a limited-purpose public figure and thus must show that O’Rourke acted with actual malice. But has made no such showing. Second, even if

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<sup>11</sup> Imagine if Texans could be sued by billionaires whenever they accuse a company of price gouging. Warren’s conception of the tort system and the First Amendment are wholly foreign to American and Texan jurisprudence.

Warren were considered only a private figure, he has not shown that O'Rourke was negligent in his statements, which he likewise has not done.

**1. Warren is a limited purpose public official and has offered no showing of actual malice.**

Warren is a limited purpose public figure and thus must show that O'Rourke acted with actual malice—which he has failed to do. A three-part test determines whether a person is a limited-purpose public figure: (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.” *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998). Warren plainly meets this test.

First, the controversy is the exorbitant prices charged by Energy Transfer, the outsized influence of gas executives over Abbott, and Abbott’s approval of loopholes to excuse gas companies from winterizing their infrastructure. This is one of the most public controversies affecting all Texans. Indeed, Warren’s \$1 million campaign check and its effect on Abbott’s lenience on the gas industry has been the subject of public discussion for over a year. *See supra* Part I (citing news articles and op-eds linking Warren’s contribution to Abbott’s inaction regarding gas industry).

Second, Warren and Abbott are the central figures in the controversy. The title of the August 1, 2021 Houston Chronical op-ed—published months prior to any of O’Rourke’s statements—evidences this: “Editorial: We froze and Abbott got paid--\$1 million from the billionaire profiteer of Texas’ deadly storm.”<sup>12</sup> Warren is thus widely known as *the* profiteer from the greatest statewide disaster in recent memory.

Third, the defamation Warren alleges is directly germane to his participation in the controversy—he alleges that O’Rourke’s statements about his campaign contribution and influence over Abbott are defamatory. Moreover, Warren’s participation is voluntary—he chose to speak one million times over with his contribution associating himself with Abbott’s policies. *See Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 638 (1996) (Thomas, J., concurring and dissenting in part) (“Whether an individual donates money to a candidate . . . or . . . spends the money to promote the candidate himself, the individual seeks to engage in political expression and to associate with like-minded persons. A contribution is simply an indirect expenditure; though contributions and expenditure thus differ in form, they do not differ in substance.”). By this measure, Warren is the *loudest* participant: in the ten days of June 2021 in which candidates could accept contributions, Abbott received 17,000 contributions totaling \$18.7 million—for an average contribution of \$1,100. CR 221.

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<sup>12</sup> Houston Chron. (Aug. 1, 2021), <https://www.houstonchronicle.com/opinion/editorials/article/Editorial-We-froze-and-Abbott-got-paid-1-16354431.php>.

Warren thus spoke at 1,000 times the volume of everyone else, prompting immediate controversy and attention from the newspaper in the largest city in the state.

Because Warren was a limited-purpose public figure for purposes of the controversy, he must put forward a prima facie case that O'Rourke acted with actual malice in order to avoid dismissal under the TCPA. Actual malice means "the publication of a statement 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" *WFAA-TV*, 978 S.W.2d at 573-74 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964)). Reckless disregard requires a showing that "the publisher 'entertained serious doubts as to the truth of his publication.'" *Id.* (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

Warren's allegations of actual malice are especially weak. He offers three arguments. First, he contends that O'Rourke continued to speak after receiving Warren's cease-and-desist letters and "without any evidence to support his defamatory statements." CR 124. But O'Rourke was hardly the only person to allege that there was an untoward connection between Warren's astronomical political contribution to Abbott and the legislative loophole for gas suppliers. *See supra*. That this was a widespread belief among reputable sources before O'Rourke even entered the conversation alone shows there cannot be knowledge of falsity or that O'Rourke harbored disbelief. Second, Warren contends that O'Rourke's "vulgar and insulting language" calling Abbott a thug and authoritarian and characterizing Warren as an oligarch shows his "malice." CR 125. But this misunderstands the legal concept; "actual



malice” is not a measure of O’Rourke’s feelings towards Warren, but rather his knowledge of falsity. Third, Warren alleges that actual malice can be inferred because O’Rourke has mistakenly called him the CEO of Energy Transfer despite his transition from CEO to Executive Chairman. CR 125. The articulation of that proposition suffices to defeat it.

**2. Warren has not shown that O’Rourke acted with negligence.**

Even if Warren were not a limited-purpose public figure, he still has not satisfied his burden to show negligence. This is so because the same arguments he proffers to support actual malice fail to show negligence for the same reasons. There is simply nothing negligent about believing that Governor Abbott’s inexplicable loophole excusing gas suppliers from winterization requirements is related to his multi-million dollar support from that industry’s executives. O’Rourke reached the same conclusions as other Texans, including the Houston Chronicle editorial board. As the U.S. Supreme Court has recognized, the federal government and most states limit campaign contributions because of “the actuality and appearance of corruption resulting from large financial contributions.” *Buckley*, 424 U.S. at 26); *id.* at 28 (noting the “reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed”). If large contributions create an “inherent” appearance of corruption, as the U.S. Supreme Court has held, then a person cannot be negligent for believing that Warren’s \$1 million campaign check did so here.

**D. Warren has not shown he suffered any damages.**

Warren has also not shown that he has suffered any damages, which he must because he has not established defamation *per se* (or actually at all). Warren has not alleged any financial damages; he has not lost his executive position at Energy Transfer, for example. There is no evidence he has lost any other income as a result of O'Rourke's statements. And he has offered no clear and specific evidence of any other type of injury. To the extent the controversy surrounding his eye-popping campaign check has injured his reputation, the damage was done when the press immediately brought it to the public's attention.

\* \* \*

This lawsuit is a shameful abuse of the judicial system. Plaintiff feels entitled to drown out regular Texans with a \$1 million campaign check and then slink away without attention. His company raked in billions over a five-day period—billions that will be shouldered by ordinary Texans for years as they struggle to pay their energy bills. And now he uses his lawyers to seek to intimidate Texans into silence about it all.

But Plaintiff is not permitted to file retaliatory lawsuits to avoid the consequences of robust public debate about matters of urgent public importance. This lawsuit is a case study in why the legislature enacted the TCPA. The Court should order this suit dismissed, and order Plaintiff to pay Defendant's attorney's fees.

## CONCLUSION

For the foregoing reasons, the district court's order denying dismissal under the TCPA should be reversed and Plaintiff ordered to pay Defendant's attorneys' fees.

Respectfully submitted,

/s/ Chad W. Dunn

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**CERTIFICATE OF COMPLIANCE**

I certify that per Microsoft Word, this document contains 7,016 words, excluding the portions of the document exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

This brief also complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it has been prepared in a proportionally spaced typeface in 14-point font.

*/s/ Chad W. Dunn*  
Chad W. Dunn

**CERTIFICATE OF SERVICE**

I certify that on August 17, 2022, this document was served electronically on Constantine Z. “Dean” Pamphilis, Daniel Benson, and Richard T. Miller, counsel for Appellee, via [dpamphilis@kasowitz.com](mailto:dpamphilis@kasowitz.com), [dbenson@kasowitz.com](mailto:dbenson@kasowitz.com) and [rtmiller@centex.net](mailto:rtmiller@centex.net).

*/s/ Chad W. Dunn*  
Chad W. Dunn

**In the Court of Appeals  
for the Third District  
Austin, Texas**

Robert Francis O'Rourke,  
*Appellant,*

v.

Kelcy Warren,  
*Appellee.*

\_\_\_\_\_  
On Appeal from the  
424th Judicial District, San Saba County  
\_\_\_\_\_

**APPENDIX**

\_\_\_\_\_

1. Plaintiff Kelcy Warren's First Amended Petition.....Tab A
2. Trial court's Order Denying O'Rourke's Motion to Transfer Venue ..... Tab B
3. Trial court's Order Denying O'Rourke's Motion to Dismiss..... Tab C
4. Relevant Statutory provisions ..... Tab D

**TAB A: PLAINTIFF KELCY WARREN'S FIRST AMENDED PETITION**

NO. 10,204

KELCY WARREN,

*Plaintiff,*

v.

ROBERT FRANCIS O’ROURKE

*Defendant.*

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IN THE DISTRICT COURT OF

SAN SABA COUNTY, TEXAS

424th JUDICIAL DISTRICT

**PLAINTIFF’S FIRST AMENDED PETITION**

Plaintiff, Kelcy Warren (“Warren” or “Plaintiff”), by and through his undersigned attorneys, brings this First Amended Petition against Defendant, Robert Francis O’Rourke (“O’Rourke” or “Defendant”), and asserts claims for defamation, slander, and libel, in support of which Plaintiff respectfully shows the following:

**DISCOVERY LEVEL AND STATEMENT OF RELIEF**

1. Plaintiff intends to conduct discovery under Level 3 of the Texas Rule of Civil Procedure 190.4, and requests that the Court enter a discovery control plan order tailored to the circumstances of this action. Pursuant to Texas Rule of Civil Procedure 47, Plaintiff states that the damages sought are within the jurisdictional limits of this Court. *See* TEX. R. CIV. P. 47(b). Plaintiff further states that he seeks monetary relief over \$1,000,000.

**NATURE OF THE CASE**

2. Plaintiff Kelcy Warren, a private citizen, is a lifelong Texan and a successful, self-made businessman, who co-founded the midstream company Energy Transfer LP, a company based in Texas. Warren currently serves as its Executive Chairman. Warren has never run for political office and is not running now. Nor does Warren maintain a public social media

profile or regularly comment publicly on political issues. Like millions of Americans around the country, Warren exercises his right to make political contributions to the campaigns of candidates whose policies he supports, including incumbent Texas Governor Greg Abbott, to whose campaigns for Governor and Attorney General, Warren has donated in every year since 2010, except 2016.

3. Defendant O'Rourke, a failed politician who lost both his 2018 race for U.S. Senate and his 2020 race for the Presidency, announced in November 2021 that he would challenge Governor Abbott in the Texas gubernatorial election this coming November. Shortly after his announcement, and trailing Governor Abbott in the polls, Defendant O'Rourke began a relentless and malicious attack on Warren by accusing him of serious crimes including extortion, bribery, and corrupt influence, simply because Warren made a campaign contribution to Governor Abbott in June 2021 and is the former CEO of Energy Transfer. Defendant O'Rourke has repeatedly stated, with no basis in fact whatsoever, that Warren "broke the law" and committed felonies — extortion, bribery, and corruption — when he purportedly "bought [] off" Governor Abbott "not to fix" the power grid in Texas so that Energy Transfer supposedly could make money in the event the grid failed. Warren has not spoken publicly nor sought publicity concerning the matters that are the subject of Defendant O'Rourke's baseless accusations.

4. Defendant O'Rourke intentionally, repeatedly, and widely disseminated his deliberate and defamatory falsehoods through publicly released messages on Twitter, Facebook, and other social media sites and during speaking engagements and interviews. O'Rourke intended that his malicious and baseless defamatory statements publicly humiliate Warren and discourage others from contributing to Governor Abbott's campaign. Defendant's statements that Warren has committed felonies in a purported effort to profit off the suffering of his fellow



Texans are completely out of bounds for any speech, let alone as talking points for a candidate for the Governor of the State of Texas. The accusations go well beyond the sorts of vague and generalized accusations of political and corporate corruption that are often thrown around; rather, they focus on a particular person, a particular campaign contribution, at a specific point in time, and a particular purported favor done in exchange for the contribution. Defendant O'Rourke's false and malicious statements about Plaintiff Warren constitute defamation *per se*.

5. Before bringing this action, Plaintiff Warren twice demanded that Defendant O'Rourke retract his defamatory statements and cease and desist from hurling further defamatory falsehoods against Warren. Not only has Defendant O'Rourke refused to do so, but he has continued to disseminate widely his false and defamatory accusations that Warren has committed crimes and is now soliciting campaign donations to fund his smear campaign against Warren. Two weeks after this action was filed, Defendant O'Rourke convened a press conference in Dallas not to apologize for and withdraw his defamatory statements but to announce that he will fund his defense of this action with campaign donations, even though he, and not his campaign, was sued. He has even gone so far as to compare Plaintiff Warren to a corrupt Russian oligarch – even though Warren is a life-long Texan, not a Russian, and a self-made businessman. Defendant O'Rourke, on the other hand, is a desperate political candidate who makes money by running for political office and writing books about his failed attempts to win office. It is plain that Defendant O'Rourke has no regard whatsoever for the truth and will say and do anything that he deems expedient to win public office or to profit from his loss.

## **PARTIES**

6. Plaintiff, Kelcy Warren, is a private citizen and resident of San Saba County, in the State of Texas.

7. Defendant, Robert Francis O'Rourke, is an individual domiciled in the State of Texas who has been served and appeared in the above-captioned action.

## **JURISDICTION AND VENUE**

8. This Court has subject matter jurisdiction over this action because the amount in controversy exceeds the minimum jurisdictional limits of the Court. TX. CONST. ART. 5, § 8; TEXAS GOV'T CODE § 24.007. All causes of actions, claims and issues of law pertain to damages stated herein arise under and are brought pursuant to the laws of the State of Texas.

9. This Court has personal jurisdiction over Defendant O'Rourke because he resides in the State of Texas.

10. Venue is mandatory for this action in San Saba County, Texas pursuant to TEX. CIV. PRAC. & REM. CODE ANN. § 15.017 because this is a suit for damages for libel, slander and defamation, which shall be brought in the county in which Plaintiff resided at the time of the accrual of the cause of action and Plaintiff resided in San Saba County, Texas at the time of the accrual of the causes of action asserted in this action.

11. Plaintiff's residence is located on Los Valles Ranch which is located in the town of Cherokee, which is located in San Saba County, Texas. Plaintiff's residence on the property is a large, permanent, fixed place of abode that was constructed in or around 2014-2015 (the "House").

12. Los Valles Ranch is owned in fee by Los Valles Ranch LLC. Plaintiff owns 100% of Los Valles Ranch LLC and is the sole member of the company. Plaintiff, as the

ultimate owner of Los Valles Ranch, has an undisputed right of possession over the property and the House, and resided in the House upon accrual of the causes of action asserted in this suit. In total, Plaintiff has an undisputed right of possession to over 21,000 acres of property in San Saba County.

13. At all times relevant to this action, Plaintiff has occupied and used the House as his residence consistently over a substantial period of time. Since at least 2003, when the original acreage for Los Valles Ranch was purchased, Plaintiff has had a residence on the property where he has spent a considerable amount of time each year and since 2014-2015 when the House was constructed, Plaintiff has occupied the House and utilized it as his residence for at least 2-3 months per year and primarily during the period of time between the Thanksgiving holiday through April each year. This includes time spent in the House during the Thanksgiving, Christmas, New Years and Easter holidays. Plaintiff, who gathered with members of his family at the House during Christmas and New Years 2021, was at the House in San Saba County when Defendant O'Rourke commenced his public defamatory campaign against him in December 2021.

14. Plaintiff has developed significant ties to the San Saba County community since he purchased Los Valles Ranch and became a resident of the County. For example, Plaintiff hosts the Cherokee Creek Music Festival, which is run by Cherokee Crossroad Inc., at Los Valles Ranch every year, with the exception of 2020 when the event had to be canceled due to COVID-19. Plaintiff donated in excess of \$800,000 to build a pavilion on the property for the Festival which houses the stage and seating for 600-800 attendees as well as facilities for the performers. The Festival, which draws approximately 2,500 patrons yearly, was started 16 years ago to benefit charities and, due to Plaintiff's support, Cherokee Crossroads Inc. has been able to

raise over \$2 million for local charities and other organizations, including in excess of \$1 million that was raised for the Cherokee Home for Children in San Saba County, the Cherokee Volunteer Fire Dept in San Saba County and Cherokee ISD in San Saba County. Cherokee Crossroads Inc. has the right to use the property for the Cherokee Creek Music Festival for the next 30 years as a result of a 40-year ground lease with Los Valles Ranch that was agreed to approximately 10 years ago.

15. Plaintiff has also made many other charitable contributions for the benefit of San Saba County since he purchased Los Valles Ranch. For example, Plaintiff has contributed over \$2,000,000 to Cherokee ISD, which is a public K-12 school located in Cherokee, San Saba County, Texas, to build a new gymnasium.

16. Plaintiff has, directly or indirectly, provided significant support to businesses in San Saba County in connection with operations on Los Valles Ranch and his residence in the House. Since 2008, Plaintiff has, directly or indirectly, paid approximately \$3.4 million for products and services in San Saba County, including, but not limited to, vehicle repair, veterinary care, fuel, groceries and feed, construction, landscaping, and water well and windmill services.

17. Plaintiff intends to continue residing in the House consistent with his past residency for the foreseeable future.

### **STATEMENT OF FACTS**

18. Plaintiff Warren is a private citizen with an established history of making political contributions in Texas, including contributions to Governor Abbott's campaigns for political office in every year from 2010 through 2020, except 2016. In June 2021, Warren made a \$1 million contribution to Governor Abbott's campaign, following Don Huffines' May 2021 announcement that he would challenge Governor Abbott in the Republican primary for the 2022

gubernatorial election in Texas. Following Huffines' announcement, observers noted that Huffines, a wealthy real estate developer and former Texas state senator, possessed "independent wealth [that] would allow him to run a bare-bones campaign, and he'd probably garner media attention as a well-known name in the primary."<sup>1</sup> At the time, there was also speculation as to other potential challengers for the Republican primary, including former U.S. congressman and then-Chair of the Republican Party in Texas, Allen West.<sup>2</sup> Mr. West did, in fact, announce his own candidacy on July 4, 2021. Governor Abbott ultimately prevailed in the Republican primary held on March 1, 2022, garnering 67% of the primary vote, but the challenges from Huffines and West – who each received double-digit percentages of the primary vote – made this primary much more competitive than the Republican primaries in the 2014 and 2018 elections, when Governor Abbott faced no significant primary challengers and received over 90% of the primary vote.

19. Defendant O'Rourke is a failed candidate for U.S. Senate and the Presidency. On November 15, 2021, he announced that he would be running for governor of Texas in the November 2022 election, in an effort to unseat incumbent Governor Greg Abbott. Badly behind in the polls after he announced his candidacy and with winter approaching, and seeking to capitalize off the unprecedented storm in Texas the prior winter,<sup>3</sup> Defendant O'Rourke blamed

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<sup>1</sup> <https://www.statesman.com/story/news/politics/state/2021/05/10/texas-election-2022-don-huffines-greg-abbott-republican-primary/5020561001/>

<sup>2</sup> *Id.*

<sup>3</sup> In February 2021, a series of major winter storms caused record-low temperatures and snowfall throughout Texas and other parts of the country. The U.S. Department of Commerce's National Oceanic and Atmospheric Administration called these storms an "unprecedented and historical eight-day period of winter weather... across South-Central Texas." In Texas, the Electric Reliability Council of Texas ("ERCOT") manages the flow of Texas' power supply, governed by a board of directors and subject to oversight by the Public Utility Commission of Texas ("PUC") and the Texas Legislature. In July 2021, Governor Abbott ordered the PUC to "take immediate action to improve electric reliability across the state." Earlier this year, before the first winter storm in Texas in 2022, ERCOT's interim Chief Executive Officer explained that ERCOT has "been working for the last year to make sure that this grid is more reliable than it ever has been in the past and it is." During the February 2022 winter ice storms, "despite near-record electricity demand," the Texas grid held up, as ERCOT maintained 17,000 megawatts of excess

Governor Abbott for the power plant failures during that storm and predicted further similar failures based on the malicious and false (not to mention absurd) statement that Governor Abbott decided not to protect Texas's energy grid because Warren paid him not to do so.

20. This statement is not only false, but (like all Defendant's defamatory statements described below) it completely ignores the roles that ERCOT, PUC, and the Texas Legislature play in the management of Texas' power grid and the oversight thereof and ignores the fact that Energy Transfer and Plaintiff Warren have never owned or operated the electric generation plants which are part of the Texas power grid.

21. Since late December 2021, Defendant has leveled a defamatory campaign against Plaintiff, repeatedly stating, with actual malice and reckless disregard of the truth, and without any basis, that Plaintiff—a private citizen who has not spoken publicly nor sought publicity concerning the matters that are the subject of Defendant O'Rourke's baseless accusations, has committed the felonies of extortion, bribery, and corrupt influence. Warren is not a public figure, either generally or for a limited purpose, and cannot be transformed into one solely by Defendant O'Rourke's defamatory statements attempting to link—for political gain—the February 2021 winter storms and the winterization of the Texas power grid with Warren's legal and entirely unconnected campaign contribution.

22. On December 30, 2021, Defendant O'Rourke retweeted a tweet by Governor Abbott, in which the governor stated that Texas power plants were "good to go" to protect Texas against cold weather. Defendant O'Rourke added the following defamatory statement on top of the re-tweeted message: "We won't be 'good to go' until gas supply companies are ready for

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capacity – enough extra electricity to power 3 million homes. <https://dfw.cbslocal.com/2022/02/04/texas-grid-held-up-this-time-with-enough-extra-capacity-to-power-3-million-homes/>

cold weather. But you left them off the hook b/c gas CEOs like Kelcy Warren donated millions to your reelection campaign after the grid failure.”<sup>4</sup>

23. A few days later, on January 4, 2022, Defendant O’Rourke claimed that Texans who lost their lives in the February 2021 natural disaster “were killed by the incompetence and corruption of Abbott,”<sup>5</sup> who he claimed “hasn’t required gas CEOs to do anything” to protect against extreme weather “because they’ve donated millions to [Abbott’s] campaign.”<sup>6</sup> This tweet was less than a week after the tweet in which Defendant O’Rourke specifically identified Plaintiff Warren (and only Plaintiff Warren) as a “gas CEO.” *See supra* ¶ 22.

24. On January 20, 2022, Defendant O’Rourke tweeted that gas supply companies “bought [Abbott] off,”<sup>7</sup> and along with that defamatory claim, Defendant O’Rourke retweeted an article about Energy Transfer, the company with which Warren is affiliated. Less than two hours later, Defendant O’Rourke tweeted that Governor Abbott did not fix the grid because “the CEOs of [gas-supply] companies are his largest campaign contributors.”<sup>8</sup>

25. Less than two hours after that, in his third tweet of the day attacking Plaintiff, Defendant O’Rourke explicitly accused Plaintiff Warren of the crimes of “extortion” and “corrupt” influence<sup>9</sup>:

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<sup>4</sup> <https://mobile.twitter.com/BetoORourke/status/1476666390635495436>

<sup>5</sup> <https://mobile.twitter.com/BetoORourke/status/1478485133485391877>

<sup>6</sup> <https://mobile.twitter.com/BetoORourke/status/1478485135049777157>

<sup>7</sup> <https://mobile.twitter.com/BetoORourke/status/1484190554275692546>

<sup>8</sup> <https://mobile.twitter.com/BetoORourke/status/1484216295361060867>

<sup>9</sup> <https://mobile.twitter.com/BetoORourke/status/1484241368595763201>

← **Tweet**

**Beto O'Rourke**   
@BetoORourke



Gas company Energy Transfer Partners says: "give us \$22M or we cut the power for Texans."

That's extortion.

Abbott isn't stopping them because their CEO bought him off with a \$1M check.

That's corrupt.

I will fix the grid & hold extortionists and corrupt officials to account.

**WFAA**  @wfaa · Jan 20

A fight is unfolding between two Texas energy giants, and power to 400,000 homes is being used as leverage.

[wfaa.com/article/news/l...](https://wfaa.com/article/news/l...)

2:08 PM · Jan 20, 2022 · Twitter for iPhone

**1,673** Retweets **72** Quote Tweets **4,623** Likes





26. On February 1, 2022, with the first major winter storm of the year approaching Texas, Defendant O'Rourke stated that Plaintiff Warren paid Governor Abbott not to fix the electricity grid.<sup>10</sup>

27. On February 4, 2022, Defendant O'Rourke again stated that Warren and others engaged in "corruption" in a tweet with which he posted a video of himself explicitly stating that "they broke the law" and "paid off Greg Abbott[.]"<sup>11</sup> In another tweet later that day, Defendant O'Rourke stated that "[e]nergy executives robbed us while Texans froze to death" and "Abbott let it happen because they gave him a cut."<sup>12</sup> The same day, Defendant O'Rourke also posted a long video on his Facebook page in which he stated that Abbott "was paid not to [weatherize the grid]. Kelcy Warren's company Energy Transfer Partners made \$2.4 billion over those five days that people were dying and suffering in the state of Texas...following that winter storm he wrote Greg Abbott a \$1 million check. Looks a lot like a bribe to me."<sup>13</sup>

28. The next day, February 5, 2022, Defendant O'Rourke tweeted a video of himself referring to \$4.6 million in campaign contributions that Governor Abbott received from "the energy industry, the same people who did not want their equipment weatherized" and then reiterated his claim from the prior day that "it looks a lot like a bribe to me." The tweet accompanying the video stated, in full: "Why hasn't Abbott done everything in his power to fix the power grid? Corruption."<sup>14</sup>

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<sup>10</sup> <https://www.youtube.com/watch?v=PvBODr3Mh40>

<sup>11</sup> <https://mobile.twitter.com/BetoORourke/status/1489667156631511043>

<sup>12</sup> <https://mobile.twitter.com/BetoORourke/status/1489788837240975360>

<sup>13</sup> <https://www.facebook.com/betoorourke/videos/498764985011316>

<sup>14</sup> <https://mobile.twitter.com/BetoORourke/status/1490069303089106946>

29. The next day, February 6, 2022, Defendant O'Rourke tweeted that "[g]as corporations made \$11 billion by robbing Texans as they literally froze to death in their own homes," and in a video he posted of himself accompanying the tweet, he stated that if he becomes governor, he will "seek justice from those who defrauded the people of this state."<sup>15</sup> Later that day, Defendant O'Rourke tweeted that "Abbott got paid off not to fix the grid" and in a video of himself accompanying the tweet made the same claim.<sup>16</sup>

30. The next day, February 7, 2022, Defendant O'Rourke tweeted a video of himself discussing the tragic story of a man who suffered frostbite brought on by the "unprecedented" February 2021 storm. Defendant O'Rourke stated that "[t]his was no Act of God or Mother Nature," and instead blamed that tragic story and hundreds of lost lives on Governor Abbott and "his donors in the gas industry." In the video, Defendant O'Rourke also said "[l]et's make sure there is justice, and consequences, for those who broke the law[.]"<sup>17</sup> The same day, a local news outlet in San Antonio reported that Defendant O'Rourke accused Plaintiff Warren of bribing Governor Abbott.<sup>18</sup>

31. On February 10, 2022, Defendant O'Rourke retweeted the defamatory statement that Plaintiff Warren bribed Governor Abbott.<sup>19</sup> At a stop in San Antonio on that day, Defendant O'Rourke stated that Plaintiff Warren bribed Governor Abbott and "paid Abbott to do nothing." Defendant O'Rourke posted a video of the speech containing those statements to his Facebook page.<sup>20</sup>

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<sup>15</sup> <https://mobile.twitter.com/BetoORourke/status/1490354861698920454>

<sup>16</sup> <https://mobile.twitter.com/BetoORourke/status/1490455331239079943>

<sup>17</sup> <https://mobile.twitter.com/BetoORourke/status/1490709700932943872>

<sup>18</sup> <https://woai.iheart.com/content/2022-02-07-orourke-abbott-accepted-bribe-from-energy-billionaire/>

<sup>19</sup> <https://mobile.twitter.com/JeremySWallace/status/1491851477207375872>

<sup>20</sup> <https://www.facebook.com/betoorourke/videos/4389568934482152/>

32. On February 11, 2022, an attorney for Warren wrote a letter to Defendant, demanding that he retract his defamatory statements against Warren and cease and desist from disseminating further such statements. But just three days later, on February 14, 2022, Defendant O'Rourke responded by maliciously releasing a campaign ad in which he reiterated the defamatory accusations described above. In that video, Defendant specifically named Plaintiff Warren and his company, and claimed "Why did Greg Abbott not fix the grid? They paid him not to fix the grid."<sup>21</sup>

33. On February 17, 2022, an attorney for Warren wrote another letter to Defendant, which described certain of Defendant's defamatory statements about Warren in detail and again demanded that Defendant retract his statements and cease and desist from further defamation against Warren. Defendant again failed to respond and Plaintiff Warren then filed this action on February 18, 2022.

34. Following Plaintiff's second demand for retraction and the filing of this action, Defendant O'Rourke continued to disseminate widely his defamatory and false accusations against Plaintiff. On March 7, 2022, over two weeks after the action was filed, Defendant O'Rourke convened a half-hour press conference for the sole purpose of generating media attention for his narrative for this action and to attempt to monetize his defamatory statement to generate donations for his fledgling campaign for Governor. Defendant O'Rourke livestreamed his press conference on the internet, and then later widely disseminated it on social media.<sup>22</sup> At that press conference, O'Rourke used a series of large demonstrative aides to confirm that he

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<sup>21</sup> <https://mobile.twitter.com/BetoORourke/status/1493232016359403520>

<sup>22</sup> <https://mobile.twitter.com/BetoORourke/status/1500917314761355274?ext=HHwWIMCr-Y6WqtOpAAAA>

intended his defamatory statements about Warren to be construed as statements of fact and not opinion.

35. Defendant O'Rourke began the March 7, 2022 press conference by stating that he "want[s] to make sure first that we're all on the same page about the facts around the power grid failure." O'Rourke also stated that "[w]hile Texans froze to death, energy corporations made billions of dollars." Immediately after that statement, he continued: "And I want to make clear, this is really important for what I'm about to tell you. They did so illegally." O'Rourke continued, reading directly from one of his demonstratives, that "Greg Abbott let them off the hook." The next demonstrative O'Rourke presented stated that "Abbott gets his cut."<sup>23</sup>

36. Defendant O'Rourke's next demonstrative stated, "A \$1 Million Campaign Check With Abbott's Name On It." After placing this demonstrative on the stand, O'Rourke began specifically targeting Warren. He stated: "Energy Transfer Partners, Kelcy Warren's company, made \$2.4 billion during those five days of the freeze...So again, Kelcy Warren's company made extraordinary windfall profits...He turns around and as soon as he is able to, writes a \$1 million campaign contribution check to Greg Abbott."<sup>24</sup>

37. A few minutes later in that press conference, Defendant O'Rourke stated: "Everything I've shared with you is factual...All I have done today and all I have done over the course of the campaign is to share these facts with the electorate that will decide the outcome of this next election." O'Rourke then specifically referred to the instant action, before stating that Warren "ma[d]e illegal windfall profits off the suffering, misery, and death, or our fellow Texans[.]" When asked by a reporter for more details about the suit, O'Rourke stated that "we

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

feel very, very good about, obviously, the facts underlying the things that I've been saying along the way, the exact same things that I just said in front of you here today... We're looking forward to being able to continue to share this story, whether it's in the court room or whether it's in the court of public opinion, we're going to make sure that the people of Texas have the facts."<sup>25</sup>

38. Although Defendant O'Rourke presented his defamatory statements as facts, he did not and he cannot demonstrate the truth of any of his defamatory statements. O'Rourke has failed to identify any evidence specifically related to Warren that he knew or had reason to believe would support his claims (in part because such evidence does not exist).

39. After Defendant O'Rourke explained, in response to a reporter's question, that he would be using campaign funds to defend the lawsuit against him personally, he attempted to portray himself as a victim by stating, among other things, that "we've got to make sure that we are defending ourselves, but the important issue for me is that we defend the people of Texas. They are the ones who've been attacked by their governor. They are the ones who've been attacked by Kelcy Warren." Toward the end of the conference, O'Rourke stated, with regard to the defamation suit, that "the facts are clearly supporting the connections I've made[.]" He also stated that "this was the corrupt deal that I'm trying to call everyone's attention to, is, [Abbott] gave Kelcy Warren and others free license to charge as much as they wanted to." The final question of the press conference was "earlier you said that Abbott effectively killed Texas residents, do you believe that?" O'Rourke responded, "I do, absolutely . . . Greg Abbott chose his donors and political contributors over the people of Texas and the people of Texas paid the price."<sup>26</sup>

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

40. The next day, Defendant O'Rourke disseminated a video of a speech he gave in College Station, Texas, in which he stated that energy company CEOs "have paid [Abbott] to look the other way, to not fix the problem" and explained that as governor, "we're going to make sure we hold those accountable . . . not just the \$11 billion that they stole from us, but let's go after double or treble damages," before telling the crowd that they are paying for the profits of the energy company CEOs "who stole from us and our fellow Texans."<sup>27</sup>

41. In keeping with Defendant O'Rourke's fearmongering politics, he has even attempted to capitalize on Russia's invasion of Ukraine and the desperate situation faced by the Ukrainians. On March 12, 2022, Defendant O'Rourke disseminated on social media an excerpt from an interview in which he stated that he had recently discussed "the continued rise of authoritarians and thugs across the world" with the Ambassador from the European Union – a comment which, made less than three weeks after Russia's invasion of Ukraine, clearly implicated Vladimir Putin (among others). O'Rourke continued that, "we have our own right here in the State of Texas," and explicitly called Greg Abbott "a thug" and "an authoritarian." When asked about by a reporter about his outlandish statement, O'Rourke elaborated by stating, "let me make the case," after which he immediately mentioned Plaintiff Warren by name and shortly thereafter stated that Abbott has "his own oligarch in the State of Texas," which O'Rourke intended to refer to Warren. O'Rourke then stated that "[y]ou think this stuff only exists in Russia or other parts of world. It's happening right here." O'Rourke, therefore, directly compared Plaintiff Warren to a Russian oligarch facilitating Vladimir Putin's regime, as the Putin regime's ongoing war was devastating the lives of millions of Ukrainians and shocking the

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<sup>27</sup> <https://mobile.twitter.com/BetoORourke/status/1501306847881576451?ext=HHwWhoC-7fan29UpAAAA>

conscience of the entire world.<sup>28</sup> Plaintiff Warren is a life-long Texan, not a Russian, and is a self-made businessman.

42. On March 21, 2022, Defendant O'Rourke disseminated on social media an article about his campaign stop in Lubbock, Texas.<sup>29</sup> The article reported that O'Rourke stated of Plaintiff Warren's campaign contribution that "[i]f that is not corruption, I don't know what is."<sup>30</sup>

43. Throughout his defamatory campaign, Defendant O'Rourke has repeatedly emphasized that his statements about Plaintiff Warren are statements of fact, not O'Rourke's own opinions. He has reiterated and doubled down on his defamatory claims, despite receiving two retraction letters informing him of the falsity of his statements, and he has done so without any evidence to support his defamatory statements. *See supra* ¶ 32-34. This is, at the very least, reckless disregard of the truth. As O'Rourke continues to campaign for donations (including to pay his fees in the instant suit), he has repeatedly accused Plaintiff Warren of crimes, merely for doing the very same thing that O'Rourke's own campaign contributors (which include billionaires and people in the oil & gas industry as well) do: making a campaign contribution to the political candidate of his choice. The notion that Warren's contribution to Governor Abbott's campaign constitutes a crime even in Defendant O'Rourke's mind is plainly absurd and obviously false and, at the very least, inherently improbable and obviously dubious.

44. The injurious motive with which Defendant O'Rourke has made his malicious attacks on Warren is clear: O'Rourke wants to retaliate against large donors of his political competitor. O'Rourke also wants to deter others from donating large amounts to Greg Abbott's

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<sup>28</sup> <https://mobile.twitter.com/thehill/status/1502796077770104836?ext=HHwWiCzlcLEgNspAAAA>

<sup>29</sup> <https://mobile.twitter.com/KCBD11/status/1505983286161678345?ext=HHwWkoC9Ibv0qeYpAAAA>

<sup>30</sup> [https://www.kcbd.com/2022/03/21/beto-orourke-makes-campaign-stop-lubbock-talks-public-education-healthcare-jobs/?utm\\_source=twitter&utm\\_medium=social&utm\\_campaign=snd&utm\\_content=kcbd](https://www.kcbd.com/2022/03/21/beto-orourke-makes-campaign-stop-lubbock-talks-public-education-healthcare-jobs/?utm_source=twitter&utm_medium=social&utm_campaign=snd&utm_content=kcbd)

campaign, by making them fear that they, too, will be dragged into the news through the repeated dissemination of false accusations by O'Rourke, who has a far reaching pulpit, given his millions of social media followers and the fact that he is the Democratic candidate for Governor of Texas.

45. Defendant O'Rourke's malice is further demonstrated by the particularly vulgar and insulting language with which he has made a number of his accusations. For example, in a recent interview conducted after the filing of this action, a clip of which O'Rourke disseminated widely on social media, O'Rourke called Greg Abbott an "authoritarian" and a "thug" like "authoritarians and thugs across the world" including Vladimir Putin, and named Plaintiff Warren as an "oligarch" like those supporting Putin. These comments were made as the Putin regime's offensive war was ongoing in Ukraine, devastating the lives of millions of Ukrainians, and shocking the conscience of the entire world. *See supra* ¶ 41. O'Rourke has also repeatedly couched his false accusations of bribery and corruption against Plaintiff Warren, not simply as alleged profiteering, but as alleged profiteering off of the death and suffering of Texans. *See supra* ¶¶ 27, 29, 35, 37.

46. Defendant O'Rourke's malice is also demonstrated by the many errors and omissions of fact – in addition to the primary defamatory lie that Warren has committed crimes – that O'Rourke has made repeatedly throughout his defamatory campaign. For example, he repeatedly refers to Plaintiff Warren as the CEO of Energy Transfer, even though Warren publicly stepped down as CEO at the end of 2020 (before any of the alleged events that are the subject of O'Rourke's accusations purportedly occurred). And in characterizing Warren's entirely legal campaign contribution as a "bribe" and "corrupt," O'Rourke has repeatedly failed



to inform his listeners and the public that there are no limits on campaign contributions in Texas.<sup>31</sup>

47. Throughout his defamatory campaign, O'Rourke has demonstrated, at the very least, a persistent and purposeful avoidance of the truth. In promoting his defamatory statements, O'Rourke also misrepresented, distorted, and oversimplified other facts and failed to gather facts, or update and correct statements of fact, instead allowing his false narrative to build momentum and take on a life of its own. For example, a cursory review of Twitter reveals countless Tweets, Retweets and Replies referring to Warren as a "corrupt"<sup>32</sup> "oligarch"<sup>33</sup> who "bribed"<sup>34</sup> or "bought"<sup>35</sup> Governor Abbott with his campaign contribution. A number of Twitter users even try to make a connection between Warren and Vladimir Putin (and other Russian oligarchs) based on Defendant O'Rourke's defamatory statements.<sup>36</sup> Many of these comments are made on their own or in response to Tweets by third parties unconnected to Defendant O'Rourke, Warren, or Governor Abbott, indicating that Defendant O'Rourke's defamatory

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<sup>31</sup> Defendant O'Rourke has also repeatedly failed to inform his listeners of a fact that he very well knows: namely, that the gas prices charged during the 2021 winter storm were *within the legal cap on such prices*. This omission emphatically demonstrates O'Rourke's malice in trying to couch such prices as illegal price-gouging and theft. *See supra* ¶¶ 36-37, 40, 46.

<sup>32</sup> <https://twitter.com/VotersDemand/status/1503378055124992000> ;  
<https://twitter.com/JennyTXDem/status/1500970653289173004> ;  
<https://twitter.com/PattieSmitty/status/1501339126024454147>

<sup>33</sup> <https://twitter.com/AtxEffie/status/1501038117184225284> ;  
<https://twitter.com/CariMarshallTX/status/1500987400297852934>

<sup>34</sup> <https://twitter.com/Texpat1845/status/1488893118514667520> ;  
<https://twitter.com/AstroSaintTige1/status/1500956404630310912> ;  
<https://twitter.com/CarrieW97130892/status/1500957263212818435> ;  
<https://twitter.com/CarrieW97130892/status/1509291783066468366>

<sup>35</sup> [https://twitter.com/west\\_tech74/status/1509635964213342214](https://twitter.com/west_tech74/status/1509635964213342214) ;  
<https://twitter.com/tejaswoman/status/1503027531213070338> ;  
<https://twitter.com/SportsPrincess/status/1500949195246776321>

<sup>36</sup> <https://twitter.com/VeteransForBeto/status/1501037414722281475> ;  
<https://twitter.com/l2obel2t/status/1501076625873674244> ;  
<https://twitter.com/PurpleRain713/status/1500989300149821447>

statements were widely disseminated and that some readers actually believe Defendant O'Rourke's baseless accusations about Warren. These statements indicate that people of ordinary intelligence have interpreted Defendant O'Rourke's defamatory statements in a manner that tends to injure Warren's reputation, exposes him to public hatred, contempt, and ridicule, may expose him to financial injury, and impeaches Warren's honesty, integrity, virtue and reputation.

48. Defendant O'Rourke has also admitted that it is his responsibility that the specific issue of Warren's campaign contribution became news (and that it was Defendant O'Rourke's intention to make it news), stating that "this was the corrupt deal *that I'm trying to call everyone's attention to*, is, [Abbott] gave Kelcy Warren and others free license to charge as much as they wanted to." *See supra* ¶ 39 (emphasis added). Meanwhile, Warren has not made any public statements about the 2022 campaign for Texas governor, nor has he commented publicly about the 2021 winter storm crisis, the power-grid issues related thereto or this action. Neither has Warren done anything else to inject himself into any public controversy regarding these topics.

49. Defendant O'Rourke's deliberately false statements that Plaintiff Kelcy Warren committed serious crimes including extortion, bribery, and corrupt influence are baseless and malicious lies which sought to publicly humiliate Plaintiff Warren. Defendant O'Rourke should be held liable for his lies and forced to pay for the damage he has caused.

## CAUSES OF ACTION

### **Defamation, Libel, and Slander**

50. Plaintiff Warren incorporates by reference all of the preceding paragraphs as if fully set forth herein.

51. Defendant O'Rourke published the foregoing statements of purported fact referring to Plaintiff Warren.

52. The foregoing statements by Defendant O'Rourke were false in their particular details and in their gist and essence in the entire context in which they were made.

53. The foregoing statements by Defendant O'Rourke were defamatory, libelous and slanderous (collectively, "defamatory" or "defamation") and in making the statements, Defendant O'Rourke acted with actual malice, and with knowledge of the falsity of the defamatory statements, or at least with reckless disregard of their falsity by purposefully avoiding the truth, making inherently improbable assertions and, in fact, lying about Plaintiff Warren's commission of what are serious crimes in the State of Texas.

54. The foregoing defamatory statements by Defendant O'Rourke were not privileged.

55. The foregoing defamatory statements by Defendant constitute defamation *per se* in that they falsely state that Plaintiff Warren committed the crimes of extortion, bribery, and corrupt influence, and in that they plainly accuse Plaintiff Warren of breaking the law.

56. The foregoing defamatory statements by Defendant O'Rourke injured Plaintiff Warren's reputation and exposed him to public hatred, animus, contempt or ridicule, or financial injury. These false statements were made with the intent to impeach Plaintiff Warren's honesty, integrity, virtue, or reputation and thereby expose him to financial injury. The defamatory statements are therefore defamatory *per se*.

57. The foregoing defamatory statements by Defendant O'Rourke have injured Plaintiff Warren in his vocation, occupation, and profession and are therefore defamatory *per se*.

58. A reasonable reader would understand that all of foregoing statements referred to Plaintiff Warren because, among other things, they referred to him by name or by affiliation or as the Chief Executive Officer of Energy Transfer.

59. Defendant O'Rourke has failed to retract the defamatory statements, though he was requested to do so, and he has failed to exercise ordinary care to prevent the foreseeable republication of the foregoing written and published defamatory statements.

60. Defendant O'Rourke is strictly liable for the damages caused by his defamatory statements. Alternatively, Defendant O'Rourke was negligent with respect to the truth or falsity of the defamatory statements of purported fact. Alternatively, Defendant O'Rourke knew and knows that the defamatory statements of fact were false, or was reckless with regard to whether the statements of purported fact were false.

61. As a result of Defendant O'Rourke's defamatory statements, Plaintiff Warren suffered pecuniary injury and damages are presumed.

### **DAMAGES**

62. Plaintiff Warren incorporates by reference all of the preceding paragraphs as if fully set forth herein.

63. Plaintiff Warren is entitled to nominal, general, actual and special damages resulting from Defendant O'Rourke's defamation, including compensation for injury to Plaintiff Warren's character and reputation.

64. Plaintiff Warren is also entitled to special and consequential damages, including specifically the pecuniary loss suffered because of Defendant O'Rourke's defamation.

65. In addition to the damages set forth above, Plaintiff Warren seeks to recover punitive or exemplary damages against Defendant O'Rourke for his conduct, which constitutes malice as described in Chapter 41 of the Texas Civil Practice & Remedies Code. Further, Defendant acted with a specific intent to cause injury to the plaintiff or conscious indifference to the rights, safety, or welfare of the plaintiff with actual, subjective awareness that its conduct involved an extreme degree of risk of harm to Plaintiff Warren. Plaintiff Warren also seeks punitive and exemplary damages in order to punish and deter the outrageous conduct taken in heedless and reckless disregard for Plaintiff Warren's reputation and as a result of Defendant's conscious indifference in destroying his reputation.

#### **JURY DEMAND**

66. Plaintiff Warren demands a jury trial on all issues so triable. Plaintiff Warren has deposited or intends to deposit with the Clerk of Court the required jury fee.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff Warren prays that citation be issued and Defendant O'Rourke be served in this case and that upon trial of this matter, Plaintiff recover:

- a. Nominal, general, actual, special, consequential, exemplary, and punitive damages as described above, in an amount to be determined at trial, but in excess of the jurisdictional limits of this Court;
- b. The costs of litigation, including reasonable legal and consulting fees, expert witness fees, and any other costs deemed reasonable;
- c. Pre- and post-judgment interest at the maximum rate allowed by law;
- d. Such further and other relief, both general and special, at law or in equity, to which Plaintiff Warren may show himself justly to be entitled, or as this Court may deem appropriate; and
- e. Any other damages or other relief deemed just and proper.

Respectfully submitted,

KASOWITZ BENSON TORRES LLP

By: /s/ Constantine Z. Pamphilis

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*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing has been served on all counsel of record pursuant to the Texas Rules of Civil Procedure on this the 14th day of April, 2022.

/s/ Constantine Z. Pamphilis  
Constantine Z. "Dean" Pamphilis

**TAB B: TRIAL COURT'S ORDER DENYING O'ROURKE'S  
MOTION TO TRANSFER VENUE**





**TAB C: TRIAL COURT'S ORDER DENYING O'ROURKE'S MOTION TO DISMISS**

CAUSE NO. 10,204

KELCY WARREN  
PLAINTIFF

VS.

ROBERT FRANCIS O'ROURKE  
DEFENDANT

§  
§  
§  
§  
§  
§  
§

IN THE DISTRICT COURT  
OF SAN SABA COUNTY, TEXAS

424<sup>TH</sup> JUDICIAL DISTRICT

**ORDER DENYING DEFENDANT'S MOTION TO DISMISS**

On June 16, 2022, the Court heard Defendant's Motion to Dismiss. After hearing argument of counsel and taking the matter under advisement, this Court is of the opinion that the Motion to Dismiss should be and is hereby DENIED.

SIGNED on this the 5<sup>th</sup> day of July, 2022.



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JUDGE PRESIDING

**TAB D: RELEVANT STATUTORY PROVISIONS**

CIVIL PRACTICE AND REMEDIES CODE

TITLE 2. TRIAL, JUDGMENT, AND APPEAL

SUBTITLE B. TRIAL MATTERS

CHAPTER 27. ACTIONS INVOLVING THE EXERCISE OF CERTAIN CONSTITUTIONAL RIGHTS

Sec. 27.001. DEFINITIONS. In this chapter:

(1) "Communication" includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.

(2) "Exercise of the right of association" means to join together to collectively express, promote, pursue, or defend common interests relating to a governmental proceeding or a matter of public concern.

(3) "Exercise of the right of free speech" means a communication made in connection with a matter of public concern.

(4) "Exercise of the right to petition" means any of the following:

(A) a communication in or pertaining to:

(i) a judicial proceeding;

(ii) an official proceeding, other than a judicial proceeding, to administer the law;

(iii) an executive or other proceeding before a department of the state or federal government or a subdivision of the state or federal government;

(iv) a legislative proceeding, including a proceeding of a legislative committee;

(v) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity;

(vi) a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue;

(vii) a proceeding of the governing body of any political subdivision of this state;

(viii) a report of or debate and statements made in a proceeding described by Subparagraph (iii), (iv), (v), (vi), or (vii); or

(ix) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of

public concern occurring at the meeting;

(B) a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(C) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(D) 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 or in another governmental or official proceeding; and

(E) any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.

(5) "Governmental proceeding" means a proceeding, other than a judicial proceeding, by an officer, official, or body of this state or a political subdivision of this state, including a board or commission, or by an officer, official, or body of the federal government.

(6) "Legal action" means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal, declaratory, or equitable relief. The term does not include:

(A) a procedural action taken or motion made in an action that does not amend or add a claim for legal, equitable, or declaratory relief;

(B) alternative dispute resolution proceedings; or

(C) post-judgment enforcement actions.

(7) "Matter of public concern" means a statement or activity regarding:

(A) a public official, public figure, or other person who has drawn substantial public attention due to the person's official acts, fame, notoriety, or celebrity;

(B) a matter of political, social, or other interest to the community; or

(C) a subject of concern to the public.

(8) "Official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

(9) "Public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if the person has not yet qualified for office or assumed the person's duties:

(A) an officer, employee, or agent of government;

(B) a juror;

(C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;

(D) an attorney or notary public when participating in the performance of a governmental function; or

(E) a person who is performing a governmental function under a claim of right but is not legally qualified to do so.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by:

Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 1, eff. September 1, 2019.

Sec. 27.002. PURPOSE. The purpose of this chapter 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 and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Sec. 27.003. MOTION TO DISMISS. (a) If a legal action is based on or is in response to a party's exercise of the right of free speech, right to petition, or right of association or arises from any act of that party in furtherance of the party's communication or conduct described by Section 27.010(b), that party may file a motion to dismiss the legal action. A party under this section does not include a government entity, agency, or an official or employee acting in an official capacity.

(b) A motion to dismiss a legal action under this section must be filed not later than the 60th day after the date of service of the legal action. The parties, upon mutual agreement, may extend the time to file a motion under this section or the court may extend the time to file a motion under this section on a showing of good cause.

(c) Except as provided by Section 27.006(b), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.

(d) The moving party shall provide written notice of the date and time of the hearing under Section 27.004 not later than 21 days before the date of the hearing unless otherwise provided by agreement of the parties or an order of the court.

(e) A party responding to the motion to dismiss shall file the response, if any, not later than seven days before the date of the hearing on the motion to dismiss unless otherwise provided by an agreement of the parties or an order of the court.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by:

Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 2, eff. September 1, 2019.

Sec. 27.004. HEARING. (a) A hearing on a motion under Section 27.003 must be set not later than the 60th day after the date of service of the motion unless the docket conditions of the court require a later hearing, upon a showing of good cause, or by agreement of the parties, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(b) In the event that the court cannot hold a hearing in the time required by Subsection (a), the court may take judicial notice that the court's docket conditions required a hearing at a later date, but in no event shall the hearing occur more than 90 days after service of the motion under Section 27.003, except as provided by Subsection (c).

(c) If the court allows discovery under Section 27.006(b), the court may extend the hearing date to allow discovery under that subsection, but in no event shall the hearing occur more than 120 days after the service of the motion under Section 27.003.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 1, eff. June 14, 2013.

Sec. 27.005. RULING. (a) The court must rule on a motion under Section 27.003 not later than the 30th day following the date the hearing on the motion concludes.

(b) Except as provided by Subsection (c), on the motion of a party under Section 27.003, a court shall dismiss a legal action against the moving party if the moving party demonstrates that the legal action is based on or is in response to:

- (1) the party's exercise of:
  - (A) the right of free speech;
  - (B) the right to petition; or
  - (C) the right of association; or
- (2) the act of a party described by Section 27.010(b).

(c) The court may not dismiss a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.

(d) Notwithstanding the provisions of Subsection (c), the court shall dismiss a legal action against the moving party if the moving party establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 2, eff. June 14, 2013.

Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 3, eff. September 1, 2019.

Sec. 27.006. PROOF. (a) In determining whether a legal action is subject to or should be dismissed under this chapter, the court shall consider the pleadings, evidence a court could consider under Rule 166a, Texas Rules of Civil Procedure, and supporting and opposing affidavits stating the facts on which the liability or defense is based.

(b) On a motion by a party or on the court's own motion and on a showing of good cause, the court may allow specified and limited discovery relevant to the motion.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by:



Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 4, eff. September 1, 2019.

Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 5, eff. September 1, 2019.

Sec. 27.007. ADDITIONAL FINDINGS. (a) If the court awards sanctions under Section 27.009(b), the court shall issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation.

(b) The court must issue findings under Subsection (a) not later than the 30th day after the date a request under that subsection is made.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by:

Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 6, eff. September 1, 2019.

Sec. 27.0075. EFFECT OF RULING. Neither the court's ruling on the motion nor the fact that it made such a ruling shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by the ruling.

Added by Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 7, eff. September 1, 2019.

Sec. 27.008. APPEAL. (a) If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal.

(b) An appellate court shall expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss a legal action under Section 27.003 or from a trial court's failure to rule on that motion in the time prescribed by Section 27.005.

(c) Repealed by Acts 2013, 83rd Leg., R.S., Ch. 1042, Sec. 5, eff. June 14, 2013.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 5, eff. June 14, 2013.

Sec. 27.009. DAMAGES AND COSTS. (a) Except as provided by Subsection (c), if the court orders dismissal of a legal action under this chapter, the court:

(1) shall award to the moving party court costs and reasonable attorney's fees incurred in defending against the legal action; and

(2) may award to the moving party sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

(b) If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party.

(c) If the court orders dismissal of a compulsory counterclaim under this chapter, the court may award to the moving party reasonable attorney's fees incurred in defending against the counterclaim if the court finds that the counterclaim is frivolous or solely intended for delay.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by:

Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 8, eff. September 1, 2019.

Sec. 27.010. EXEMPTIONS. (a) This chapter does not apply to:

(1) an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney;

(2) a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer;

(3) a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action;

(4) a legal action brought under the Insurance Code or arising out of an insurance contract;

(5) a legal action arising from an officer-director, employee-employer, or independent contractor relationship that:

(A) seeks recovery for misappropriation of trade secrets or corporate opportunities; or

(B) seeks to enforce a non-disparagement agreement or a covenant not to compete;

(6) a legal action filed under Title 1, 2, 4, or 5, Family Code, or an application for a protective order under Subchapter A, Chapter 7B, Code of Criminal Procedure;

(7) a legal action brought under Chapter 17, Business & Commerce Code, other than an action governed by Section 17.49(a) of that chapter;

(8) a legal action in which a moving party raises a defense pursuant to Section 160.010, Occupations Code, Section 161.033, Health and Safety Code, or the Health Care Quality Improvement Act of 1986 (42 U.S.C. 11101 et seq.);

(9) an eviction suit brought under Chapter 24, Property Code;

(10) a disciplinary action or disciplinary proceeding brought under Chapter 81, Government Code, or the Texas Rules of Disciplinary Procedure;

(11) a legal action brought under Chapter 554, Government Code; or

(12) a legal action based on a common law fraud claim.

(b) Notwithstanding Subsections (a)(2), (7), and (12), this chapter applies to:

(1) a legal action against a person arising from any act of that person, whether public or private, related to the gathering, receiving, posting, or processing of information for communication to the public, whether or not the information is actually communicated to the public, for the creation, dissemination, exhibition, or advertisement or other similar promotion of a dramatic, literary, musical, political, journalistic, or otherwise artistic work, including audio-visual work regardless of the means of distribution, a motion picture, a television or radio program, or an article published in a newspaper, website, magazine, or other platform, no matter the method or extent of distribution; and

(2) a legal action against a person related to the communication, gathering, receiving, posting, or processing of consumer opinions or commentary, evaluations of consumer complaints, or reviews or ratings of businesses.

(c) This chapter applies to a legal action against a victim or alleged victim of family violence or dating violence as defined in Chapter

71, Family Code, or an offense under Chapter 20, 20A, 21, or 22, Penal Code, based on or in response to a public or private communication.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1042 (H.B. 2935), Sec. 3, eff. June 14, 2013.

Acts 2019, 86th Leg., R.S., Ch. 378 (H.B. 2730), Sec. 9, eff. September 1, 2019.

Acts 2021, 87th Leg., R.S., Ch. 915 (H.B. 3607), Sec. 3.001, eff. September 1, 2021.

Sec. 27.011. CONSTRUCTION. (a) This chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions.

(b) This chapter shall be construed liberally to effectuate its purpose and intent fully.

Added by Acts 2011, 82nd Leg., R.S., Ch. 341 (H.B. 2973), Sec. 2, eff. June 17, 2011.

## Automated Certificate of eService

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Gwen Kelly on behalf of Chad Dunn

Bar No. 24036507

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Envelope ID: 67390850

Status as of 8/17/2022 2:56 PM CST

Associated Case Party: RobertFrancisO'Rourke

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Status as of 8/17/2022 2:56 PM CST

#### Case Contacts

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Status as of 8/17/2022 2:56 PM CST

Associated Case Party: Kelcy Warren

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