Case No. 67120

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IN THE SUPREME COURT OF THE STATE OF NEVADA

SHELDON G. ADELSON,

Appellant,

vs.

DAVID A. HARRIS; MARC R. STANLEY;
AND NATIONAL JEWISH DEMOCRATIC COUNCIL,

Respondents.

APPELLANT'S OPENING BRIEF

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Rule 26.1 Disclosure

The undersigned counsel of record certifies that Plaintiff-Appellant is a natural person. Accordingly, there is no parent company and no publicly traded company owning any stock. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

The names of all law firms whose partners or associates have appeared for Plaintiff-Appellant in the case (including proceedings before the U.S. Court of Appeals for the Second Circuit, and the U.S. District Court for the Southern District of New York) are:

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TABLE OF CONTENTS

Page No.:

TABLE OF AUTHORITIES

CASES **Page(s)**

STATUTES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

This Court's jurisdiction is established by the Court's March 19, 2015 Order accepting two certified questions from the United States Court of Appeals for the Second Circuit under NRAP 5.

ISSUES PRESENTED

This Court has accepted the following questions:

1. Does a hyperlink to source material about judicial proceedings in an online petition suffice to qualify as a report for purposes of applying the common law fair report privilege?

Appellant, the Plaintiff in federal court, respectfully submits that the answer is no. The online "petition" at issue here accused Plaintiff of taking "Dirty Money" from "PROSTITUTION" and did not discuss or even mention any judicial proceeding. The mere presence of an unexplained hyperlink, obscured by Defendants' own presentation and wording, does not transform their petition into a "report," let alone a "fair" report, of a judicial proceeding.

2. Did Nevada's anti-strategic litigation against public participation ("anti-SLAPP") statute, NRS 41.635-.670, as that statute was in effect prior to the most recent amendments in 2013, cover speech that seeks to influence an election but that is not addressed to a government agency?

On this issue as well, Plaintiff submits that the answer is no. Prior to the 2013 amendments, the anti-SLAPP statute was limited to communications in furtherance of the "right to petition" the government, as this Court confirmed in *John v. Douglas County School Dist.*, 125 Nev. 746, 219 P.3d 1276 (2009). The 2013 amendments expanded the statute to encompass communications in furtherance of the separate right of free speech, but the legislative history confirms that the amendments were an

expansion of the statute, not a clarification. In any event, while the legislature could amend the statute prospectively, it could not retroactively override this Court's construction of the statute in *John*.

STATEMENT OF THE CASE

Defendants' On-Line "Petition." Plaintiff-Appellant Sheldon G. Adelson ("Plaintiff") is the Chairman, CEO, and major shareholder of Las Vegas Sands Corporation ("LVSC"). JA22 ¶ 4.[1] LVSC owns the Venetian Casino in Las Vegas, and one of its wholly-owned subsidiaries (Sands China Limited or "SCL") owns a casino in Macau. JA23 ¶ 16. Plaintiff finds the practice of prostitution "morally abhorrent" (JA53), and he has therefore directed his companies to adopt a "no tolerance" policy toward prostitution in their casinos here and abroad. JA30 ¶ 63. In addition, Plaintiff and his wife, Dr. Miriam Adelson, have established clinics dedicated to drug-abuse treatment and research to break the cycle of addiction that can lead women into prostitution. JA23-24 ¶¶ 17–21.

This case concerns two statements published by Defendant-Respondents Harris, Stanley and the National Jewish Democratic Council ("NJDC") (collectively "Defendants"). JA22 ¶¶ 5-8. The first is a full-color graphic "Petition" (JA38) that Defendants published on or about July 3, 2012, on the NJDC's website (JA24 ¶ 23). The Petition, which bore the title "**Tell Romney to Reject Adelson's Dirty Money**" (JA38), is reproduced in its original form below:

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[1] "JA" refers to the Joint Appendix the parties filed in the Second Circuit (Dkts. 52-53, 68-69). "SA" refers to the Special Appendix filed by Plaintiff in the Second Circuit (Dkt. 51). This brief refers to the Second Circuit record as required by this Court's March 19, 2015 Order (page 2 n.1).

Tell Romney to Reject Adelson's Dirty Money

As you saw during the Republican primaries, GOP mega-donor Sheldon Adelson dumped millions of dollars into supporting Newt Gingrich's feckless campaign. **Now he's doing the same for Mitt Romney – with no plans to stop**. But perhaps the most alarming aspect of Adelson's potentially unlimited contributions is where the money comes from.

It's well known that Adelson makes tremendous sums of money through his casinos in China which – according to 2008 Republican presidential candidate Senator John McCain (AZ) -- means that Chinese **"foreign money" (to quote McCain) is flooding our political system**. But this week, reports surfaced that in addition to his anti-union and allegedly corrupt business practices, **Adelson "personally approved" of prostitution in his Macau casinos**.

Given these reports, **Romney and the rest of the Republican Party must cease accepting Adelson's tainted money**

immediately. Sign NJDC's petition below, and click here to share the image above on Facebook to help spread the word.

Already signed? Click here to enlist your family and friends in the effort to stop the influence of Adelson's tainted money and protect our democracy.[2]

As shown above, the Petition featured a large graphic, with an image of Plaintiff's face on the left and an image of Mitt Romney's face on the right. JA38. Between the two images was text that read, in part, "IF ONE OF YOUR BIGGEST DONORS . . . REPORTEDLY APPROVED OF **PROSTITUTION**, WOULD YOU TAKE HIS MONEY?" *Id.* (emphasis in original). The word "PROSTITUTION" was the focal point of the document. It appeared in the exact center of the graphic, displayed in bold white font – the largest font in the document – against the dark background. *Id.* By contrast, the qualifier "REPORTEDLY APPROVED OF" appeared in a smaller typeface and gray text. *Id*. The Petition's graphic concluded with a directive to "SIGN THE PETITION: TELL MITT ROMNEY TO STOP TAKING MONEY FROM SHELDON ADELSON." *Id.*

Beneath the graphic, the Petition contained four paragraphs in smaller, black-on-white print, in which Defendants stated that "perhaps the most alarming aspect of Adelson's potentially unlimited contributions is *where the money comes from*." *Id*.[3] The Petition then elaborated that "reports" had just "surfaced that . . . **Adelson '<u>personally approved</u>' of prostitution**

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[2] Because a color copy may be useful to the court and the electronic filing process does not accommodate color filings, appellant respectfully requests that the court permit appellant to submit color copies of page 3 of the brief as part of the court record. Color copies have been mailed to the clerk of the court.

[3] All emphases in quoted material have been added, unless otherwise stated.

in his Macau casinos." *Id.* (emphasis in original). "Given these reports," Defendants exhorted, "**Romney and the rest of the Republican Party must cease accepting Adelson's tainted money immediately**." *Id.* (emphasis in original). Defendants called on readers to "spread the word" by sharing the Petition via Facebook and "enlist[ing]" others "in the effort to stop the influence of Plaintiff's tainted money and protect our democracy." *Id.*

Nowhere in the Petition did Defendants identify the source of their prostitution allegations. *See id*. At no point did the Petition purport to describe or mention any official proceeding. *See id*.

Instead, two paragraphs (and a full computer screen) below the emblazoned word "PROSTITUTION," Defendants embedded an internet hyperlink in the words "personally approved" when they asserted that Plaintiff "personally approved" of prostitution in his Macau casinos. JA38, JA131. The Petition did not ask the reader to open that link, nor did it tell the reader what he or she would find at the other end. JA38.

If a reader viewed the Petition on a device with internet access, scrolled down below the large-text color graphic to the smaller-print black-and-white section, and clicked on the two underscored words, the embedded hyperlink would have directed the reader to an Associated Press article on AP's website entitled "Sheldon Adelson Approved 'Prostitution Strategy': Fired Former Sands Executive" ("AP Article"). JA131. Because the Petition did not include either a reference to the AP Article or a "URL" that would enable a reader to find the article without clicking on the link Defendants provided (JA38), a reader who did not notice or was unable or unwilling to click on that link would not have had any idea on what basis Defendants had accused Plaintiff of personally approving prostitution.

The AP Article described an accusation against Plaintiff in a lawsuit brought by the former CEO of SCL, Steven Jacobs, who had been fired in 2010. JA29 ¶ 52. After SCL refused Jacobs' demand for millions of dollars, Jacobs filed suit in Nevada state court against SCL and LVSC, and later Plaintiff as well ("*Jacobs* litigation"). JA29 ¶¶ 53-55. In June 2012, Jacobs filed a declaration in the lawsuit in which he claimed that unnamed "LVSC Senior Executives informed me that [a] prostitution strategy had been personally approved by Adelson." JA30 ¶¶ 57, 60.[4]

After describing Jacobs' allegations, the AP Article noted that LVSC's counsel had described those allegations as "baseless" and "scurrilous" and stated that Jacobs had filed the allegations "only to sensationalize the case." JA131. LVSC's counsel also noted that Plaintiff "has always objected to and maintained a strong policy against prostitution." JA132.

Unlike the AP Article, Defendants' Petition did not disclose that the source of the prostitution allegations was hearsay allegations by a terminated employee who had filed a lawsuit against Plaintiff and LVSC. JA38. Nor did it disclose that Plaintiff had expressly denied the allegations in the press, or that he had not yet filed a formal response in the litigation. *Id*.

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[4] The ostensible purpose of the declaration was to support Jacobs' complaints about alleged deficiencies in LVSC's and SCL's responses to discovery requests Jacobs had served to bolster his claim that the Nevada court had personal jurisdiction over SCL. JA210-11. The *Jacobs* litigation (and the jurisdiction issue) remain pending before the district court. In August 2011, this Court issued a writ staying all issues other than jurisdiction (Case No. 58294), and since then it has entertained several other petitions for extraordinary writs regarding discovery.

Defendants' Subsequent Press Release. Other websites and the print media picked up on Defendants' allegations. JA27 ¶ 40. Shortly afterwards, Professor Alan Dershowitz, a Harvard Law School professor and a prominent Jewish Democrat, contacted Defendant Harris to "apprise him of the inaccurate, false and potentially defamatory accusation made by Defendants in the Petition." JA444 ¶ 6.[5] In that same conversation, Professor Dershowitz told Harris that Jacobs – the ultimate source of Defendants' allegations – had "written an email stating that he himself did not believe that Mr. Adelson had approved of prostitution." JA444 ¶¶ 6-7.

Notwithstanding Professor Dershowitz's disclosures, Defendants published a "Press Release" on July 11, 2012 on the NJDC website entitled "Statement Regarding NJDC's Sheldon Adelson Petition." JA27-28 ¶¶ 41, 44, JA43. Instead of retracting the Petition, Defendants reaffirmed that "[w]e stand by everything we said" and claimed that their Petition "was sourced from current, credible news accounts." JA43. Defendants stated that the "[a]ccusations against Mr. Adelson were made not by us, but by others, including Senator John McCain (R-AZ)," without distinguishing among the various "accusations" in the Petition or acknowledging that Jacobs was the sole source of the prostitution "accusations" at its heart. *Id*. After reaffirming "everything we said," Defendants declared that they were removing the Petition – not because it was false, but "in the interest of *shalom bayit* (peace in our home/community)." *Id*.

[5] Although Professor Dershowitz had represented LVSC in other matters, he was not speaking as Plaintiff's lawyer. JA444 ¶ 10.

Defendants' Press Release did not identify the "credible news accounts" or cite (even by hyperlink) any other document. *Id*. Nor did the Press Release disclose that Jacobs, the unacknowledged source of the prostitution accusations, was a terminated employee and litigant who was known to be hostile to Plaintiff, or that Plaintiff had vehemently denied the allegations. *Id*. Finally, as with the Petition, Defendants' Press Release did not mention the *Jacobs* litigation, or any other legal proceeding. *Id.*

On July 17, 2012, Plaintiff's counsel demanded a retraction. JA31 ¶ 68, JA48-50. The next day, LVSC and SCL filed a formal response to Jacobs' claims in the *Jacobs* litigation, which characterized Jacobs' accusations as "absurd" and stated that Plaintiff "regards prostitution as morally abhorrent." JA31 ¶ 69, JA331. The response included the actual email chain Jacobs had purported to describe in his 2012 Declaration. JA337-341. This evidence showed that (1) Jacobs acknowledged in an email that any corporate approval of prostitution would be "at odds with what I know to be [Plaintiff]'s 'no tolerance' policy"; and (2) LVSC's president found "no evidence" that Plaintiff or any other corporate executive had approved or tolerated prostitution. *Id*. Although news outlets reported on the response (JA31-32 ¶ 69, JA52-54), Defendants did not modify or retract their previous statements.

On August 2, 2012, the Democratic Congressional Campaign Committee, which had made accusations similar to Defendants' at or about the same time, retracted those statements, declaring that they were "untrue and unfair" and that it had been "wrong" to repeat them. JA32 ¶¶ 70-71, JA56. The Committee also "extend[ed] its sincere apology to Mr. Adelson and his family for any injury we have caused." JA56. Defendants, on the other hand, did not retract or modify their previous statements.

Proceedings in Federal Court. On August 8, 2012, Plaintiff filed a defamation complaint against Defendants in the U.S. District Court for the Southern District of New York. JA21-56. In the Complaint, Plaintiff alleged that Jacobs' "prostitution" accusation was "unequivocally false" (JA30 ¶¶ 61-63) and that Defendants republished Jacobs' accusations with "reckless disregard" for their truth or falsity (JA33-34 ¶¶ 73-80, 86) and with "actual malice" and the "specific intent to cause harm" to Plaintiff (JA35 ¶¶ 88-89).

On September 21, 2012, Defendants filed a motion to dismiss under Rule 12(b)(6) and the District of Columbia's "anti-SLAPP" statute. JA61-66. Seven months later, on April 23, 2013, Defendants filed a "special motion" to dismiss based on the *Nevada* anti-SLAPP statute (JA425-28) after the district court indicated it would likely apply Nevada law. Plaintiff opposed dismissal on numerous grounds.

On September 30, 2013, the district court granted Defendants' motion to dismiss the Complaint under Rule 12(b)(6), finding that some parts of the Petition were privileged as a "fair report" of a judicial proceeding while other portions were constitutionally protected opinion. SA27-28, SA30, SA38, SA56. The district court denied Defendants' motion under the D.C. anti-SLAPP statute, but granted their subsequent motion under the Nevada anti-SLAPP statute. SA56. As a result, Defendants have asked the district court to enter an award of over $1 million in attorneys' fees against Plaintiff.

Plaintiff appealed. After briefing, argument, and supplemental briefing, the Second Circuit certified two "significant and unresolved questions of Nevada statutory and common law" to this Court: (1) whether Defendants' hyperlink sufficed to make their Petition a "fair report" under

Nevada law, and (2) whether Nevada's anti-SLAPP statute, prior to the most recent amendments in 2013, covered Defendants' statements even though they were not addressed to a government agency. Dec. 19, 2014 2d Cir. Order (Dkt. 132) at 2. "[B]ecause we are loath to decide a constitutional question in advance of the necessity of doing so," the Second Circuit deferred decision on whether Defendants' statements were constitutionally protected "opinion" and did not certify that issue. *Id*. at 7.

SUMMARY OF ARGUMENT

I.

Defendants' defamatory statements fall well outside Nevada's privilege for fair reports of official proceedings. Defendants' Petition falsely accused Plaintiff of donating "Dirty Money" from "PROSTITUTION" he "personally approved" in Macau casinos. The Petition was entirely devoid of any indication to the reader that it was a report of any kind, "fair" or otherwise, of any official proceeding. Its text did not mention any proceeding; indeed, Defendants' presentation affirmatively obscured the source of the prostitution accusations as neutral "reports" rather than allegations made by a fired ex-manager who was suing Plaintiff for millions.

Defendants' claim of privilege is based solely on the fact that buried deep within their Petition is an unexplained hyperlink to a newspaper article describing the ex-manager's lawsuit against Plaintiff. Defendants' hyperlink does not transform their defamatory statements into a report, let alone a "fair report," of the never-mentioned litigation between Jacobs and LVSC. Defendants' Petition did not give readers any direction to follow the link, or any explanation of what they would find if they did. Moreover, the format of Defendants' presentation was designed to further

obscure the link. No court has found a hyperlink alone sufficient to qualify a statement as a fair report. To the contrary, courts in other contexts have consistently found that such unexplained, obscured hyperlinks are ineffective as a form of notice.

Even if there could be some circumstances in which the addition of a hyperlink could bring a statement within the fair report privilege, this case is surely not one of them. Besides failing to indicate that their statement was any kind of report, Defendants' one-sided content, tone, and presentation are not the fair, accurate, and impartial report that Nevada law requires. To the contrary, the entire layout of the Petition makes undeniably clear that Defendants *intended* to convey the false message that Plaintiff's campaign contributions derived from prostitution – a message that can hardly be described as "fair and impartial." The Court should accordingly answer the first certified question in the negative.

II.

Prior to the October 2013 amendments, Nevada's anti-SLAPP statute did not apply to political speech unless it was directed to a government official. The statute's substantive provision was limited to the First Amendment's "right to petition" the government, and, unlike anti-SLAPP statutes in other States, it did not extend to the distinct right of free speech. This Court thoroughly reviewed the history and purpose of the statute in *John*, and concluded – repeatedly – that the statute applied only to petitions directed to the government.

The legislature amended the statute effective October 1, 2013, adding free speech to the rights protected, and adding a new category to the definition of protected communications. The plain text of the amendments shows, and the legislative history confirms, that these

amendments were a change to existing law, not a mere clarification as Defendants here contend. Accordingly, the Court should also answer the second certified question in the negative.

ARGUMENT

I. DEFENDANTS' ACCUSATIONS LINKING PLAINTIFF TO "PROSTITUTION" DO NOT QUALIFY FOR THE "FAIR REPORT" PRIVILEGE.

A. Defendants' Statements Did Not "Report," Or Even Mention, Any Official Proceeding.

The general rules of defamation that control this appeal are well settled and widely accepted. Defendants' statement that Plaintiff's "money comes from" prostitution he "personally approved" in Macau casinos (JA38) is one that "'would tend to lower the subject in the estimation of the community, excite derogatory opinions about the subject, and hold the subject up to contempt.'" *Lubin v. Kunin*, 117 Nev. 107, 110, 17 P.3d 422, 425 (2001) (quoting *K-Mart Corp. v. Washington*, 109 Nev. 1180, 1191, 866 P.2d 274, 281-82 (1993)).

Defendants' attribution of the defamation to unnamed third parties, by saying that Plaintiff "reportedly" approved of and profited from prostitution, does not vitiate their responsibility for publishing it. "[O]ne who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it." *Restatement (Second) Torts* § 578. Nevada recognizes "the common law rule that attaches liability for libel to a person who [re]publishes a defamatory statement." *Wynn v. Smith*, 117 Nev. 6, 15, 16 P.3d 424, 430 (2001). The Ninth Circuit has likewise held that Nevada follows the "venerable" republication rule, under which "[e]very repetition of the defamation is a publication in itself, even

though the repeater states the source, or resorts to the customary newspaper evasion 'it is alleged.'" *Flowers v. Carville*, 310 F.3d 1118, 1128 (9th Cir. 2002) (quoting *Prosser & Keeton on the Law of Torts* § 113, at 799 (5th ed. 1984)). Defendants' statements that Plaintiff "reportedly" derived "Dirty Money" from "PROSTITUTION" in Macau casinos fall squarely within this rule.

The certified question arose because Defendants sought to escape the settled rule by invoking the "fair report privilege," which is "an exception to the common law rule" regarding republication. *Wynn*, 117 Nev. at 15, 16 P.3d at 430. This Court recognizes a privilege for statements that "report newsworthy events in judicial proceedings." *Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212, 215, 984 P.2d 164, 166 (1999). The purpose of the privilege is "to inform the public what transpires in the courtroom and to ensure the fairness of the proceedings." *Id*. "The fair report privilege is premised on the theory that members of the public have a manifest interest in observing and being made aware of public proceedings and actions." *Wynn*, 117 Nev. at 14, 16 P.3d at 429.

"The privilege's underlying purpose – encouraging the dissemination of fair and accurate reports – also suggests a natural limit to its application." *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 739 (D.C. Cir. 1985). Thus, "the privilege does not apply" if a report is "unfair or inaccurate." *Id*. This Court has likewise recognized that the privilege applies only if the underlying report is "fair, accurate, and impartial." *Lubin*, 117 Nev. at 114, 17 P.3d at 427.

As the term "fair report" suggests, courts have recognized (and both sides here have agreed) that the privilege requires not only that the challenged statement be "fair," but also that it be a "report" of an official

proceeding. Thus, the privilege is "unavailable where the report is written in such a manner that the average reader would be unlikely to understand the [statement] to be a report on or summary of an official document or proceeding." *Dameron*, 779 F.2d at 739. Accordingly, the threshold requirement for the privilege is a clear indication on the face of the statement that it is reporting what transpired in an official proceeding.

But Defendants' Petition did not tell the public what transpired in any courtroom, nor did it further any public interest in observing official proceedings. Their Petition never mentioned the *Jacobs* litigation. Indeed, Defendants never said that any legal proceedings were pending against anyone anywhere. As Defendants conceded before the Second Circuit, "[y]ou're absolutely right that nothing on the face of the petition refers to a judicial proceeding." Aug. 28, 2014 Tr. 41 (2d Cir. Dkt. 121).

Far from reporting any official proceeding, Defendants' Petition actively obscured the true source of its defamatory accusations. It emblazoned "**Dirty Money**" and "**PROSTITUTION**" and minimized qualifying language like "reports." JA38 (emphasis in original). Even if a reader caught them, Defendants' phrasing conveyed the misleading impression of unbiased, vetted "reports" by journalists or government officials rather than a single slanted, untested allegation in a lawsuit. Their subsequent Press Release reinforced that mischaracterization, asserting that the accusations came "from current, credible news accounts." JA43. The manifest intent of Defendants' statements was not to convey information about any judicial proceeding, but to convey as fact – unmediated by its status as mere allegations in a lawsuit – the false message that Plaintiff's campaign donations were "**Dirty Money**," because "the money comes

from" **PROSTITUTION** that Plaintiff "'**personally approved ... in his Macau casinos.**" JA38 (emphasis in original).

The straightforward conclusion, then, is that Defendants' accusations about prostitution are not a "report" of any official proceeding. Defendants' statements "are so minimally related to governmental proceedings that the reader would not realize that any governmental report or proceeding was being described" and they accordingly serve no interest in keeping the public abreast of such proceedings. *Dameron*, 779 F.2d at 740 (statement about plane crash not privileged as report of agency proceeding, as it was not "tied to any particular governmental report or proceeding" and did not "mention[] the [agency]"); *see also White v. Fraternal Order of Police*, 909 F.2d 512, 528 (D.C. Cir. 1990) (NBC broadcast not privileged "report," because "[n]ot once did [reporter] mention the Cox Committee investigation or the FOP letters, presenting instead historical facts as if they were the results of his own questioning of 'police sources'"); *Hughes v. Washington Daily News Co.*, 193 F.2d 922, 923 (D.C. Cir. 1952) (news report not privileged because it "mentioned no authority or source for its unqualified statements that appellants 'are charged with making and passing . . . bogus money'").

B. Defendants' Obscured, Unexplained Hyperlink Does Not Transform Their Petition Into A "Report" Of Any Official Proceeding.

Because their own statements are insufficient to support the privilege they seek, Defendants are forced to try piggybacking onto a report made by someone else in a separate document: the AP Article. Defendants contend that, by merely embedding in their Petition an unexplained hyperlink to the AP Article (within the two words "personally

approved," buried a full screen below their Petition's full-color graphic accusations). They transformed a document that says nothing about any proceeding into a privileged "fair report." Defendants themselves conceded in the Second Circuit that they "need the hyperlink" and that with "no hyperlink, [they] would have no claim to this privilege." Aug. 28, 2014 Tr. 41, 48 (2d Cir. Dkt. 121).

Defendants' unexplained hyperlink does not qualify for the fair report privilege because it contained *no textual reference* to any judicial proceeding. Nowhere did Defendants tell readers to click on the link, or say even in general terms that the link would lead to a report about a court proceeding. *See* JA38. Defendants simply embedded a hyperlink under two words ("personally approved") in a 227-word Petition. *Id*. Such a link provides no information whatsoever unless the reader: (1) is connected to the internet (as opposed to reading a printed version); (2) notices the two underlined words and recognizes them as a hyperlink; (3) takes the initiative to click on the hyperlink; and (4) then spends the time necessary to read the destination page.

Worse, the format and presentation of Defendants' Petition were designed to minimize the likelihood that readers would notice and feel any need to consult the link. Defendants' "**PROSTITUTION**" graphic filled the screen, and it was a self-contained attack: it leveled charges, drew conclusions, and told readers to act "**immediately.**" JA38 (emphasis in original). By contrast, Defendants' hyperlink did not appear until the small-print section, a full computer screen and two paragraphs below Defendants' lurid graphic. *See id*. The link underscored only two of the Petition's 227 words, and it was unaccompanied by any invitation to follow the link or any explanation of what the reader would find if he or she did

so. To further divert the reader, the Petition surrounded the critical link with other hyperlinked terms that did *not* lead to any official proceeding, along with a kaleidoscope of shifting emphases (colors, brackets, large type, bold print, and all-caps). *Id*. So even if a reader's eyes reached the hyperlink Defendants view as essential to their claim of privilege, he or she might not have noticed it at all, might have dismissed it as another generic internet source, or might have thought the underscore was simply another form of emphasis rather than a link. Even if the reader recognized the link, Defendants' graphic presentation and provocative text were designed to drive or at least predispose the reader to accept Defendants' conclusions and act "**immediately**" rather than encouraging him or her to take the time and check the sources of the accusation.

Defendants bear the "burden of properly alleging the privilege." *Lubin*, 117 Nev. at 114, 17 P.3d at 427. Yet they have cited no authority in any jurisdiction adopting their position that an unexplained hyperlink alone is enough to create a fair report. To the contrary, courts across the country – including the Ninth Circuit and the federal district court in Nevada – have consistently held in other contexts that an unexplained hyperlink does *not* provide sufficient notice to a reasonable reader. Indeed, those courts rejected hyperlinks even though they were more prominent than the buried link on which Defendants here rely.

In *Specht v. Netscape Communications*, 306 F.3d 17 (2d Cir. 2002), for example, the defendant argued that when internet users downloaded software from a webpage, they received notice of (and therefore agreed to) a hyperlink leading to a mandatory arbitration agreement. The Second Circuit rejected that argument because the hyperlink did not give a "reasonably prudent" reader sufficient notice of the contract terms at the

destination page. *Id*. at 31. As the court explained, the hyperlink at issue was "submerged" and "conceal[ed]" two screens below a graphic that invited readers to "Download With Confidence Using SmartDownload!" (*id*. at 23) – just as Defendants submerged their link on a screen below a graphic that urged readers to "**Tell Romney To Reject [Plaintiff's] Dirty Money**." Indeed, Defendants' hyperlink is *more* obscure than the one deemed inadequate in *Specht*, which at least encouraged the reader to "[p]lease review and agree to the [hyperlinked] terms." *Id*. at 23. Yet the court held that the defendant's hyperlink was "not sufficient" because the web page was designed to "conceal" the hyperlinked terms. *Id*. at 32.

Similarly, *Campbell v. General Dynamics Government Systems Corp.*, 407 F.3d 546 (1st Cir. 2005), held that a hyperlink embedded in an e-mail from an employer to its employees did not give readers reasonable notice of a mandatory arbitration agreement. Just as Defendants' Petition here did not explain their link or mention any official proceeding, the e-mail in *Campbell* "did not state directly that the [linked] Policy contained an arbitration agreement," an omission the court deemed a "fundamental flaw." *Id*. at 557. And just as Defendants used provocative phrasing and presentation to obscure their hyperlink, the "tone and choice of phrase" of the e-mail in *Campbell* obscured the linked arbitration agreement by suggesting that arbitration was merely optional. *Id*. Notably, the court found the defendant's hyperlink was insufficient to notify readers, even though the federal policy in favor of arbitration gave the defendant in that case a "relatively light burden" of affording "some minimal level of notice" (*id*. at 555) – policy considerations that do not apply here.

The Ninth Circuit followed suit in *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171 (9th Cir. 2014). The court acknowledged that the hyperlink at

issue there (labeled "Terms of Use") was more conspicuous than the one in *Specht*, as it appeared on "every page" of the website in "close proximity to the buttons" for completing purchases. *Id*. at 1177. In addition, the link appeared in "underlined, color-contrasting text." *Id.* Nevertheless, the court held the hyperlink was still "insufficient" to notify readers of the linked material because it "otherwise provides no notice to users nor prompts them to take any affirmative action." *Id*. at 1179. "Given the breadth of the range of technological savvy of online purchasers, consumers cannot be expected to ferret out hyperlinks to terms and conditions to which they have no reason to suspect they will be bound." *Id*.

Applying Nevada law, Nevada's federal district court enforced the same principles in *In re Zappos.com, Inc. Customer Data Security Breach Litigation*, 893 F. Supp. 2d 1058 (D. Nev. 2012). The court found that an unexplained hyperlink, like the one employed by Defendants here, was insufficient to give a reader notice of the website's Terms of Use for buyers. As the court explained, "the website never directs a user to the Terms of Use" (just as Defendants here never explained the link or told readers to follow it), and the hyperlink was "inconspicuous, buried in the middle to bottom of every ... webpage" (just as Defendants buried their link beneath a provocative color graphic, on a different screen and in smaller print). *Id*. at 1064. Further, like the hyperlink at issue here, the link in *Zappos.com* was simply one "among many other links" on the page. *Id*.

The repeated lesson of all these cases and the legion of other authorities they cite is that where the law makes it important that the reader receive information, a hyperlink alone does not convey that information – and a link that "is buried at the bottom of the page" like the

one here is "refused" as patently insufficient. *Nguyen*, 763 F.3d at 1177. In contract cases, it is important that the reader receive information about the contract's terms because "assent" to those terms "is the touchstone of contract." *Id*. at 1175. For the "fair report" privilege, it is equally important that the reader receive information about an official proceeding, because the touchstone of the privilege is the public "interest in observing and being made aware of public proceedings and actions." *Wynn*, 117 Nev. at 14, 16 P.3d at 429. "[T]he intended beneficiary of the privilege is the public, not the press." *Dameron*, 779 F.2d at 739. "The privilege is not simply a convenient means for shielding the media from tort liability" (*id*.), and it should not be extended to defendants who bury a hyperlink as a "convenient means" to invoke the privilege without actually conveying any report of official proceedings to the public. A document that does not itself give the public any information about any official proceeding, but depends entirely on an unexplained, obscured hyperlink, is simply not a "report" of official proceedings and is not entitled to the privilege.

While the above analysis is enough standing alone to answer the certified question in the negative, hyperlinks suffer from another defect. They are unstable even for the diligent reader who notices and tries to follow them. Hyperlinks have an "ephemeral nature" because the destination page often disappears after a relatively brief period of time. SA24 n.13. Recent studies have shown that this phenomenon, known as "link rot" or "reference rot," is a "serious problem." Jonathan Zittrain, Kendra Albert & Lawrence Lessig, *Perma: Scoping and Addressing the Problem of Link and Reference Rot in Legal Citations*, 127 HARV. L. REV. F. 176, 178 (2014). A Harvard study showed that more than 70% of the links in Harvard journal citations, and 50% of the links in U.S. Supreme Court

opinions, had gone "rotten." *Id*. A Yale study revealed that 29% of the links in 2009-2010 Supreme Court opinions had become invalid in only three years. Raizel Liebler & June Liebert, *Something Rotten in the State of Legal Citation: The Life Span of a U.S. Supreme Court Citation Containing an Internet Link (1996-2010)*, 15 YALE J. L. & TECH. 273, 293, 298 (2012-2013). "Even recent links are vulnerable to rot," particularly links to news media sites, which frequently move articles within 7-30 days to archives that can be accessed only by paid subscribers. L. Jay Jackson, *Missing Links: "References Rot" Is Degrading Legal Research and Case Cites,* ABA Journal (Dec. 2013) at 17. This instability provides even more reason to reject the blanket endorsement of hyperlinks that Defendants seek.

C. Defendants' Statements Were Not "Fair and Impartial."

Even if the inclusion of a hyperlink could qualify an internet posting as a fair report under some circumstances, it does not succeed here in light of Defendants' failure to satisfy the independent requirement that such reports must be "fair, accurate, and impartial." *Lubin*, 117 Nev. at 114, 17 P.3d at 427. "Opinions must be left to the editorial pages," and a reporter cannot embellish his or her account with "defamatory observations or comments." *Sahara Gaming*, 115 Nev. at 215, 984 P.2d at 166. The Second Circuit stated that this Court "may certainly discuss these other requirements of the fair report privilege as it deems relevant to this case." Dec. 19, 2014 2d Cir. Order (Dkt. 132) at 8 n.3.

Consistent with this Court's requirement that reports be fair, accurate and impartial, a report on judicial proceedings will not qualify for the fair report privilege if it presents a "one-sided" view of the litigation. *Lubin,* 117 Nev. at 115, 17 P.3d at 427. The defendants in *Lubin* circulated a

publication stating that a lawsuit filed against the plaintiff was not "frivolous," and that an "abundance of evidence as well as eyewitnesses" supported the allegations. *Id.* at 110, 17 P.3d at 424. This Court held that the fair report privilege did not support dismissal because the defendants' publication was not "fair and impartial." *Id*. at 115, 17 P.3d at 427. The Court stressed that the privilege did not apply to statements presenting only a "one-sided view of the action." *Id.*

Defendants' Petition was neither fair nor impartial. To the contrary, the content and the format of their Petition make clear that Defendants *intended* to convey that it was widely reported fact, not mere unilateral allegation, that Plaintiff's campaign contributions flowed from prostitution. The Petition began with the bold – and unqualified – headline "**Tell Romney To Reject Adelson's Dirty Money**." JA38 (emphasis in original). The Petition then made "**PROSTITUTION**" the dominant focal point by placing it in the center of a color graphic – by itself – in the largest typeface of the document, using stark white print against a dark background, while placing the qualifier "reportedly approved" in washed-out gray and a much smaller typeface. *Id*. To introduce its allegations, the Petition stated that "perhaps the most alarming aspect of Adelson's potentially unlimited contributions is *where the money comes from*." *Id.* The obvious intent of Defendants' artful presentation – and its undeniable effect – was not to tell the public about an allegation made by a party adverse to Plaintiff in the *Jacobs* litigation but to convey the defamatory message that Plaintiff's political contributions constituted "Dirty Money" derived from "Prostitution" that he "personally approved" in Macau casinos. *Id*.

Defendants later reinforced this message by issuing a Press Release stating that "[w]e stand by everything we said" (JA43), without

acknowledging that Professor Dershowitz had apprised Defendants of the falsity of the charge. Furthermore, in the same Press Release, Defendants claimed that their conclusions came "from current, credible news accounts," thus reinforcing the impression that the allegations resulted from the investigations of a neutral journalist (rather than the obviously partisan claims of a biased litigant based on rank hearsay) and further concealing any reference to any official proceeding. JA43.

The contrast between Defendants' statements and the AP Article brings Defendants' unfairness into sharp relief. Unlike the Petition, the AP Article described the litigation, set forth both sides of the story (Jacobs' accusations and Plaintiff's emphatic denials), identified Jacobs as the source of the allegations, and disclosed key information bearing on Jacobs' biases and credibility. These facts underscore the critical difference between the goal of the AP Article and Defendants' agenda. While the AP Article impartially and accurately reported both sides of a judicial proceeding, Defendants highlighted (and thereby "endorsed") the "Prostitution" allegations as the basis for their call to action, telling readers that "perhaps the most alarming aspects" of Plaintiff's contributions was "where the money comes from." JA38. If the requirement of a "fair report" is to have any meaning at all, a one-sided presentation such as this cannot be made "fair" simply by embedding a hyperlink to a report made by someone else in a separate publication.

II. PRIOR TO THE 2013 AMENDMENTS, NEVADA'S ANTI-SLAPP STATUTE WAS EXPRESSLY LIMITED TO THE "RIGHT TO PETITION," AND DID NOT COVER POLITICAL SPEECH.

A. The Statute's Plain Language, This Court's Holding In *John*, And The 2013 Amendments All Show That The Statute Was Limited To Communications Directed To The Government.

Generally, a "SLAPP" lawsuit is one filed "to chill the defendant's exercise of First Amendment rights." *John*, 125 Nev. at 752, 219 P.3d at 1280 (citation omitted). Several States have anti-SLAPP statutes, but they vary in scope, particularly in which First Amendment rights they cover. Some statutes, like Delaware's, are designed to protect only a defendant's First Amendment "right to petition the government." *See* 10 Del. Code Ann. § 8136 (covering actions "brought by a public applicant or permittee" that are "materially related to any efforts of the defendant to report on, rule on, challenge or oppose such application or permission"). Others, like California's, extend more broadly to encompass the First Amendment's distinct "right of free speech." *See* Cal. Civ. Proc. Code § 425.16 (covering actions "in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution"). The District of Columbia falls within the latter, broader camp, covering not only "petitioning the government" but also public "advocacy." D.C. Code § 16-5501(1)(A)(ii), (B). Not surprisingly, Defendants first urged the district court to choose D.C. law over Nevada law, and did not invoke the Nevada anti-SLAPP statute until it became clear the district court would not follow their desired choice of law.

By contrast, before October 1, 2013, Nevada was among the states with limited anti-SLAPP protection covering only the right to petition the government. At the time the Complaint was filed in this case,

the Nevada statute's core substantive provision protected only "[g]ood faith communication *in furtherance of the right to petition*." SA59 (NRS 41.650). A separate definitional provision reiterated the "right to petition" as the controlling term, and then enumerated three classes or "prongs" of protected petitions beneath it:

> 1. Communication that is aimed at procuring any governmental or electoral action, result or outcome;
>
> 2. Communication of information or a complaint to a Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity; and
>
> 3. Written or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law.

SA58 (NRS 41.637).

In 2009, this Court conducted a thorough examination of the pre-2013 statute in *John* and confirmed that the statute covered only communications directed to the government. 125 Nev. at 758, 219 P.3d at 1284. The Court quoted the relevant legislative history showing that "Nevada's anti-SLAPP statute is predicated on protecting well-meaning citizens *who petition [the] government* and then find themselves hit with retaliatory suits known as SLAPP [suits]." *Id.* at 753, 219 P.3d at 1281 (quotation omitted). Based on this history, as well as the statute's express language making "the right to petition" the sole substantive right covered, the Court concluded that the statute had a limited scope and protected *only* communications relating to the exercise of citizens' "rights to petition their government" (*id.*):

> [T]he anti-SLAPP statute *only protects citizens who petition the government from civil liability arising from good-faith communications to a government agency*. Nev. Rev. Stat. § 41.637. Thus, Nevada's anti-SLAPP statute is not an absolute bar against federal substantive claims; rather, it bars claims from persons who seek to abuse other citizens' rights to *petition their government*, and it allows meritorious claims against *citizens who do not petition the government in good faith*.

The Court hammered the point home by reiterating it three more times. *See id*. ("Nevada's anti-SLAPP statute … protect[s] 'well-meaning citizens *who petition [the] government*'"); *id*. at 754, 219 P.3d at 1282 (anti-SLAPP movant must show "that the lawsuit is based on 'good faith communication[s made] in furtherance of the right to *petition' the government*"); *id*. at 758, 219 P.3d at 1284 ("[T]he statute only applies in those cases involving '[g]ood faith communication in furtherance of the right to *petition' the government*"). The only two cases that have addressed *John*'s holding took the Court at its repeated word and rejected anti-SLAPP motions based on public speech rather than petitions to the government. *Collins v. Laborers Int'l Union*, 2:11-cv-528-LDG-CWH, 2011 U.S. Dist. LEXIS 79853 (D. Nev. July 21, 2011) (communication between union, employers and employees not covered by anti-SLAPP statute because they were not "good faith communications to a government agency"); *Buckwalter v. Wey*, No. 2:10-cv-108-JCM-LRL, 2010 WL 2609100 at *3 (D. Nev. June 24, 2010) (statements "made to a newspaper" not covered because "a government agency was not being petitioned").

In amendments that took effect October 1, 2013 (after the Complaint at issue here was filed), the legislature added a separate clause protecting good faith communications in furtherance of "the right to free speech." 2013 Nev. Laws ch. 176 (S.B. 286), § 2 (amending NRS 41.650).

The amendments also expanded the definitions of covered communications to include a fourth "prong" covering communications "made in direct connection with an issue of public interest in a place open to the public or in a public forum." *Id*. § 1 (amendment to NRS 41.637(4)).

The accompanying Legislative Counsel's Digest explained that the added language "expand[s]" the scope of immunity under the statute beyond the "right to petition" protected by "[e]xisting law." 2013 Nev. Laws ch. 176 (S.B. 286), Legislative Counsel's Digest, ¶ 3. Thus, these amendments demonstrate that the legislature – like this Court – understood the pre-amendment statute to protect only the right to petition the government, not a right to "public speech."

The Second Circuit has asked this Court whether the anti-SLAPP statute, prior to the October 2013 amendment, "cover[ed] speech that seeks to influence an election but that is not addressed to a government agency." The plain language of the pre-amendment statute, this Court's opinion in *John*, and the 2013 amendment, all compel the same answer: No. The operative version of the anti-SLAPP statute was clearly limited to the "right to petition" the government and did not encompass political speech. SA59 (NRS 41.650). *John* likewise concluded that the "statute *only protects citizens who petition the government* from civil liability arising from *good-faith communications to a government agency*." 125 Nev. at 753, 219 P.3d at 1281 (second emphasis in original). While Defendants called their document a "Petition," it was not addressed to any government official or agency but to the general public, and it did not seek any action by any government body.

The Second Circuit acknowledged *John* but said it "cannot be sure" whether the Court was talking about only "the second prong of the

statute" (petitions to a government agency) or instead "meant to impose a more general limitation" on the statute as a whole. Dec. 19, 2014 Order (2d Cir. Dkt. 132) at 13. This Court, however, was clear. It repeatedly declared that the anti-SLAPP *statute* applied only to petitions to government agencies, and the court nowhere limited its statements to only one class or prong of petitions. *John*, 125 Nev. at 753, 754, 758, 219 P.3d at 1281, 1282, 1284. Moreover, the court based its conclusion on the "right to petition" language (which appeared in NRS 41.650, the statute's key substantive provision, and was repeated in NRS 41.637's definitional provision above all three specific classes of petitions), not on the language of any prong. *Id.* at 753-58, 219 P.3d at 1281-84; *see* SA58 (NRS 41.637(1)-(3)).

B. The 2013 Amendments Confirm The Limited Scope Of The Statute In Effect At The Time Of The Complaint.

Defendants have argued that the 2013 amendments were simply a clarification that made no substantive change in the statute's scope. 2d Cir. Dkt. 72 at 47. That prompted the Second Circuit to wonder whether the amendments "add[ed] something missing before or merely render explicit what [the legislature] believed to be already there?" Dec. 19, 2014 Order (2d Cir. Dkt. 132) at 13.

The plain text of the statute, however, shows that the amendments were not a clarification but an expansion. The legislature added the separate "right to free speech" to the existing language in NRS 41.650 (which had previously covered only the "right to petition") and added a fourth prong covering public speech to the definition of protected communications in NRS 41.637. This was no mere fine-tuning or explanation of unclear terms, but new language protecting entirely distinct rights.

The legislative history also refutes Defendants' theory. Not one legislator or witness participating in the legislature's deliberations described the amendments as a clarification of existing law. To the contrary, the Legislative Counsel's Digest acknowledged that "*[e]xisting* law" (before the amendment) protected only "communication[s] in furtherance of the right to petition" that are made "in connection with certain governmental actions, officers, employees or entities" and recognized that the new language on free speech was a *change* that "*expands* the scope of [anti-SLAPP] immunity." 2013 Nev. Laws ch. 176 (S.B. 286), Legislative Counsel's Digest, ¶ 3. The bill's sponsor likewise described the pre-amendment statute as "protect[ing] people who exercise their First Amendment right to petition" and stated that the amendment "expands the type of protected communication to include the right to free speech." Assembly Comm. on Judiciary, 77th Sess., May 6, 2013 minutes at 2, 3 (statement of Sen. Justin Jones).

The bill's advocates all agreed that the amendments marked a change in law. A First Amendment expert based in Las Vegas testified that the then-existing statute "protects **only** 'good faith communication in furtherance of the right to petition,'" which "**limits** its scope to speech made directly to a government agency, or directly in connection with a matter under consideration by one of the government's arms." Assembly Comm. on Judiciary, 77th Sess., May 6, 2013 minutes, Ex. C (testimony of Mark Randazza; emphasis in original) at 1.[6] He stated that "Nevada stands

[6] Mr. Randazza gave the same testimony to the Senate committee. S. Comm. on Judiciary, 77th Sess., Mar. 28, 2013 minutes, Ex. D, at 1-2. The bill's sponsor described Mr. Randazza as "one of the preeminent experts on this issue." Assembly Comm. on Judiciary, 77th Sess., May 6, 2013 minutes at 3 (statement of Sen. Justin Jones).

among the states with largely ineffective Anti-SLAPP laws" and contrasted Nevada with States like "Washington, California, Oregon, and Texas," whose anti-SLAPP statutes *did* cover speech to the public as well as petitions to the government. *Id*. at 1, 2. He argued that Nevada's existing statute was "not enough" and urged legislators that "[e]xpanding the scope of Nevada's Anti-SLAPP Laws to apply to *all* speech about matters of public concern – not merely speech seeking government action – will benefit individuals and Nevada's courts." *Id*. A law professor concurred that anti-SLAPP protection under "[e]xisting Nevada law ... is limited to communication that relates to the freedom to petition one's government" and supported the amendment to "expand[] protections for free speech." Letter from Derek E. Bambauer, Associate Professor of Law, Univ. of Arizona, in Support of S.B. 286 (Mar. 25, 2013), available at https://nelis.leg.state.nv.us/77th2013/App#/77th2013/Bill/Meetings/SB286.[7]

Finally, even if the legislature did believe that it was simply clarifying existing law, or actually intended to change the law retroactively, it could not retroactively overrule this Court's construction of the statute in *John*. "It is emphatically the province and duty of the judicial department

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[7] Plaintiff recognizes that the Court's unpublished order in *Jensen v. City of Boulder City* states (in tentative terms) that the 2013 amendments "*appear* to clarify, not change, the law." No. 57116, 57635, 57667, 2014 WL 495265, at *2 (Nev. Jan. 24, 2014) (emphasis added). But Nevada Supreme Court Rule 123, and *Jensen* itself, plainly state that "[a]n "unpublished order *shall not* be regarded as precedent and *shall not be cited as legal authority*." *Id*. at *1; Nev. S. Ct. R. 123. Moreover, *Jensen* did not address the Court's previous conclusions in *John*. And, unlike the instant case, *Jensen* did not involve mere political speech made by (and directed to) members of the general public. Rather, it involved a suit by a city government seeking to block petitions for ballot initiatives.

to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803). The legislature can "*prospectively* amend a statute," but it cannot "violate the separation of powers principle by *retrospectively* abrogating judicial pronouncements of the courts of this state through a legislative interpretation of the law." *Karadanis v. Bond*, 116 Nev. 163, 170, 993 P.2d 721, 726 (2000) (emphasis in original). Moreover, Plaintiff was entitled to rely on this Court's interpretation of the statute in *John*, which remained in effect at the time he filed suit, in assessing the legal standards that would apply to his suit and the penalties to which he might be subject in the event the suit was deemed non-meritorious. The retroactive imposition of new penalties would raise serious due process problems under the state and federal Constitutions.

C. The Reference To "Electoral Action" In NRS 41.637(1) Did Not Transform The Prior Statute's "Right To Petition" Into An Expansive Protection Of All Political Speech.

The preceding section demonstrates that Defendants' attempt to reduce the 2013 amendments to a mere "clarification" is baseless. Defendants fare no better trying to rewrite the pre-amendment statute.

As discussed above, the anti-SLAPP statute's key substantive term is NRS 41.650. Before October 1, 2013, that provision conferred immunity on persons who engage in "good faith communication in furtherance of the right of petition." NRS 41.637 repeated that term and defined it by reference to three categories or "prongs" of protected petition. Defendants claim that their statements fall within the first prong, "[c]ommunication that is aimed at procuring any governmental or electoral action, result or outcome." Their theory is that the reference to "electoral

action" expanded the statute beyond petitions to the government and encompassed all political speech related to an election.

But Defendants' construction cannot be squared with the text and structure of the statute. The statute's substantive language required that the relevant communication be "in furtherance of *the right to petition*" (NRS 41.650) – *i.e.*, the right "of the people to make formal requests to the government, as by lobbying or writing letters to public officials." *Black's Law Dictionary* 1523 (10th ed. 2014). There is not the slightest ambiguity in this critical limitation. This Court recognized in *John* that the three prongs enumerated in NRS 41.637 were simply "classes of petitions." 125 Nev. at 761, 219 P.3d at 1286. They did not purport to change the critical language limiting the statute to petitions; instead, they appeared beneath that language and were subordinate to it. They did not expand the types of protected communications beyond the right of petition, nor did they purport to invade the separate territory of free speech. In attempting to elevate a mere category of petitions into a source of distinct substantive rights, Defendants are improperly trying to make the tail wag the statutory dog.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that this Court answer the Second Circuit's certified questions by stating that under Nevada law, (1) a hyperlink to source material about judicial proceedings in an online petition does not suffice to qualify as a report for purposes of applying the common law fair report privilege, and, in any event, the hyperlink at issue here was not sufficient to qualify for the fair report privilege; and (2) Nevada's anti-SLAPP statute, as that statute was in effect prior to the most recent amendments in 2013, did not cover speech

that sought to influence an election but that was not addressed to a government agency, and did not apply to the statements at issue here.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2007 in Times New Roman 14 point font.

I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 8,963 words.

Finally, I hereby certify that I have read this **APPELLANT'S OPENING BRIEF** and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every section of the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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Pursuant to Nev. R. App. P. 25, I certify that I am an employee of MORRIS LAW GROUP; that, in accordance therewith, I caused a copy of the **APPELLANT'S OPENING BRIEF** to be placed in a sealed envelope, postage pre-paid with the United States mail on the date and to the addressee(s) shown below:

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